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San Francisco  
Love Letters  
No. 1



252  
No. 11905

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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SAN DIEGO GAS & ELECTRIC COMPANY,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record


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Upon Appeal from the District Court of the United States  
for the Southern District of California  
Southern Division

FILED

JUN 2 - 1948

PAUL P. O'BRIEN,  
CLERK



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No. 11905

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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SAN DIEGO GAS & ELECTRIC COMPANY,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

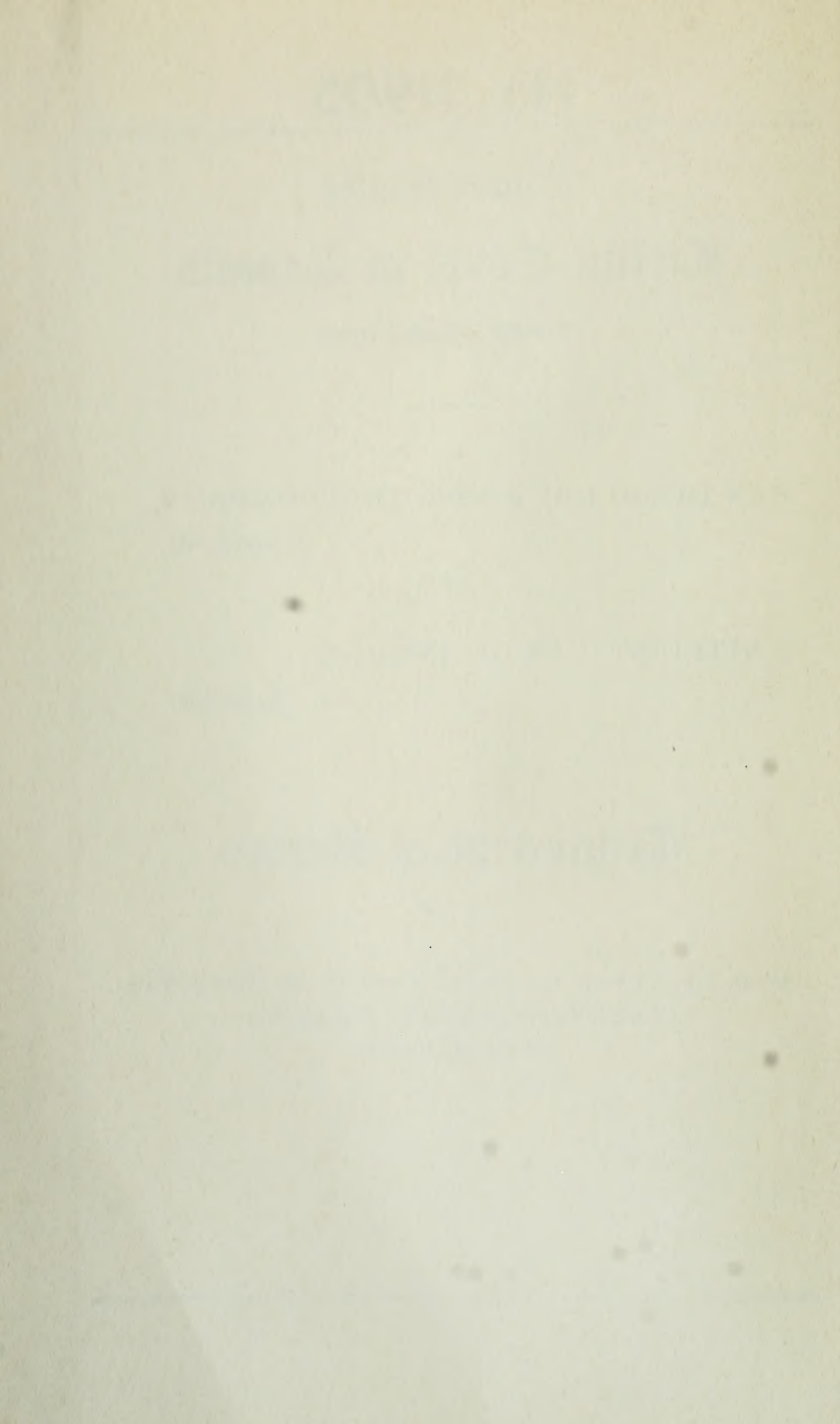
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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California  
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LUCE, FORWARD, LEE & KUNZEL,  
1220 San Diego Trust & Savings Bldg.,  
San Diego 1, Calif.

For Appellee:

JAMES M. CARTER,  
United States Attorney,

REUBEN ROSENSWEIG,  
Assistant U. S. Attorney,

600 U. S. Post Office & Court House  
Bldg., Los Angeles 12, Calif. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern  
District of California, Southern Division

No. 828—Civil

SAN DIEGO GAS & ELECTRIC COMPANY, a  
Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### COMPLAINT FOR DAMAGES

Plaintiff complains of the defendant above named,  
and for cause of action alleges:

#### I.

That this action is filed pursuant to and under  
and by virtue of the provisions of the "Federal  
Tort Claims Act."

#### II.

That the above named plaintiff is a corporation,  
duly incorporated under and by virtue of the laws  
of the State of California, with its principal place  
of business in the County of San Diego, California,  
and is a public utility engaged in supplying electric  
energy and electric light and other energies and  
commodities to the City of San Diego, to the City of  
El Cajon and to the City of Escondido and other  
municipalities within the County [2] of San Diego.

#### III.

That said plaintiff prior to the times referred to  
herein had installed and had maintained during

said time and during all of the times herein referred to, transmission lines for the transmission of electricity between the City of El Cajon and the City of Escondido, and that said transmission lines between said Cities crossed over Mission Gorge, in the immediate vicinity of the Old Mission Dam in said County of San Diego; that said transmission line consisted of three wires and crossed said Gorge in a span of approximately 1700 feet, at either end of which span were placed two double pole structures and accompanying equipment, for the purpose of holding and supporting said transmission line across said Gorge.

#### IV.

That on or about the 5th day of September, 1945, Glen D. Ferrin was a non-commissioned officer in the United States Coast Guard, to wit, a Chief Aviation Pilot, and that he was on said date attached to the United States Coast Guard Air Station at San Diego, California, and that on said date and while he was acting in line of duty operating and flying a certain airplane belonging to the defendant herein, the said Glen D. Ferrin piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with said plaintiff's transmission line crossing said Mission Gorge, thereby injuring, breaking and damaging said transmission line and the said supporting structures at either end of the same, including the equipment and installations used in connection therewith.



## V.

That as the direct and proximate cause and result of the said careless, negligent and reckless piloting and operating of said airplane as aforesaid, and the injuring and damaging of said property belonging to this plaintiff as herein alleged, plaintiff [3] was required to expend the sum of Two Thousand, One Hundred Sixty-Six and 89/100 (\$2,166.89) Dollars for the necessary repairs to said transmission line and its supporting structures, no part of which said sum has been repaid to plaintiff.

Wherefore, plaintiff prays judgment against the defendant in the sum of Two Thousand, One Hundred Sixty-Six and 89/100 (\$2,166.89) Dollars, together with Court costs.

LUCE, FORWARD, LEE &  
KUNZEL

By /s/ CHARLES H. FORWARD,  
Attorneys for Plaintiff.

State of California,  
County of San Diego—ss.

E. D. Sherwin, being duly sworn deposes and says: That he is Vice President of the San Diego Gas & Electric Company, a corporation, the above named plaintiff, and is authorized to make this verification for and on behalf of said plaintiff corporation; that he has read the forgoing Complaint for Damages and knows the contents thereof, and that the same is true of his own knowledge, except as to

those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/ E. D. SHERWIN.

Suscribed and sworn to before me, this 13th day of February, 1947.

[Seal] /s/ R. A. RUFFIN,  
Notary Public in and for said County and State.  
My Commission Expires May 17, 1947.

[Endorsed]: Filed Feb. 18, 1947. [4]

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[Title of District Court and Cause.]

## ANSWER

Comes now the defendant, United States of America, by and through its counsel of record and in answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

### I.

Admits each and every allegation contained in paragraphs I, II, and III of plaintiff's complaint on file herein.

### II.

Admits that on or about September 5, 1945, Glen D. Ferrin was a non-commissioned officer in the United States Coast Guard, to wit, a Chief Aviation Pilot, and that he was on said date attached to the United States Coast Guard Air Station at San

Diego, California, and that on said date, while acting in line of duty, was operating and flying an airplane belonging to the defendant. Defendant denies both generally and specifically that said Glen D. Ferrin piloted and operated said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with plaintiff's transmission line crossing Mission Gorge and thereby injuring, breaking and [5] damaging said transmission line and the supporting structures at either end of the same including the equipment and installations used in connection therewith.

### III.

Defendant has no information sufficient to form a belief as to the truth of the averments set forth in paragraph V of plaintiff's complaint on file herein, and basing its denial on said grounds, denies each and every allegation thereof.

For a further, second and distinct answer and affirmative defense, this answering defendant alleges as follows:

### I.

That the damage to plaintiff, if any, was caused without any fault, carelessness or negligence on the part of this answering defendant but was the result of an unavoidable accident so far as this defendant is concerned.

Wherefore, this answering defendant prays judgment as follows:



1. That the complaint of plaintiff on file herein be dismissed, and that they take nothing by virtue thereof;

2. That the defendant have its costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper in the premises.

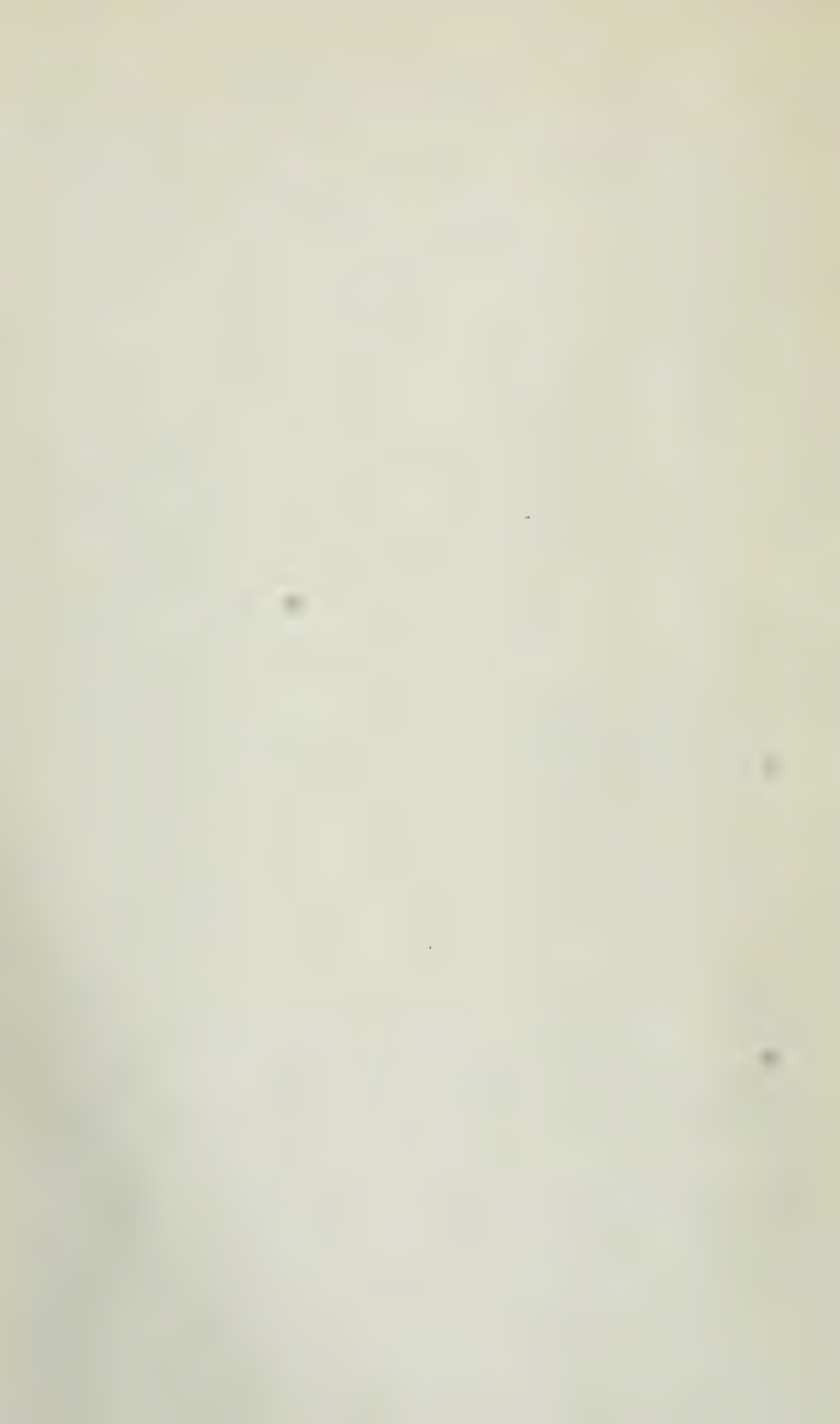
JAMES M. CARTER,  
United States Attorney.

RONALD WALKER and  
REUBEN ROSENSWEIG,  
Assistant U. S. Attorneys.

By /s/ REUBEN ROSENSWEIG,  
Attorneys for Defendant.

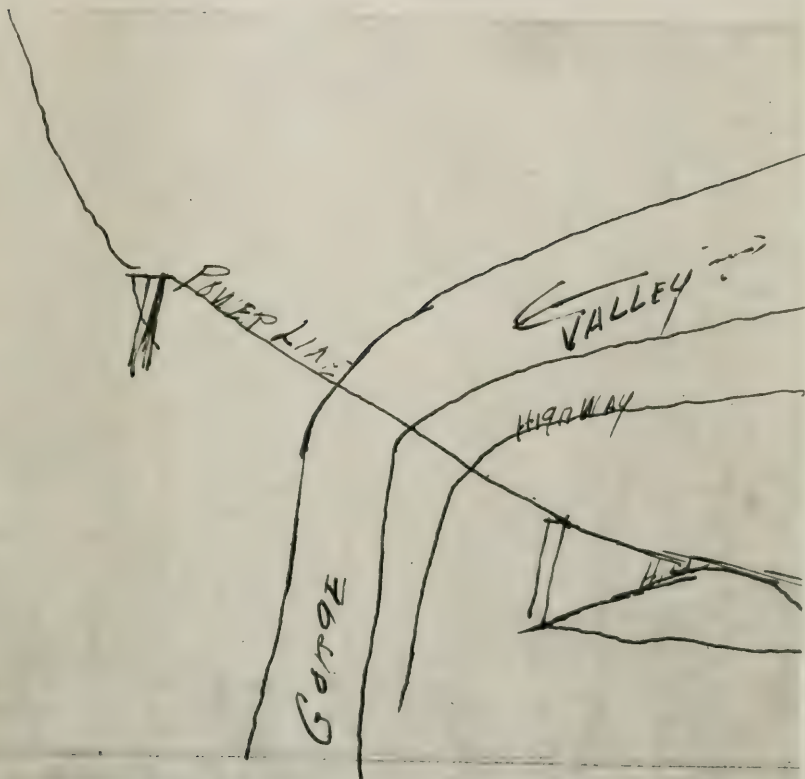
[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 2, 1947. [6]

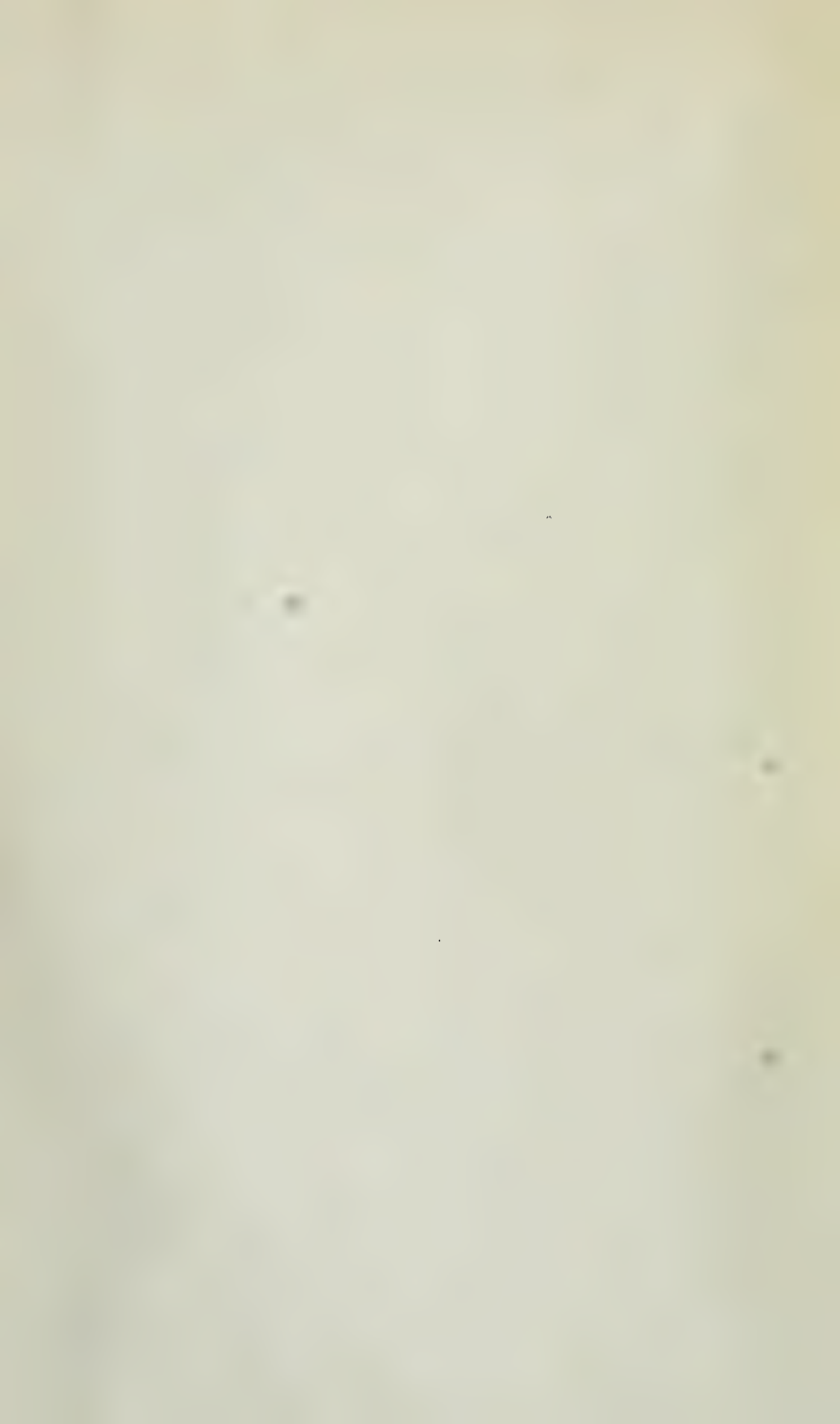


No. 828  
 FOR IDENTIFICATION  
 EXHIBIT No. 3  
 MARKED 12/9/47  
 By W. Hooper, Clerk  
 Deputy Clerk

No. 828  
San Diego Gas & Electric Co.  
 vs.  
CLLA  
San Diego  
 No. 3  
 Filed 12 7 1947  
 EDMUND L. SMITH, Clerk  
 By W. Hooper  
 Deputy Clerk

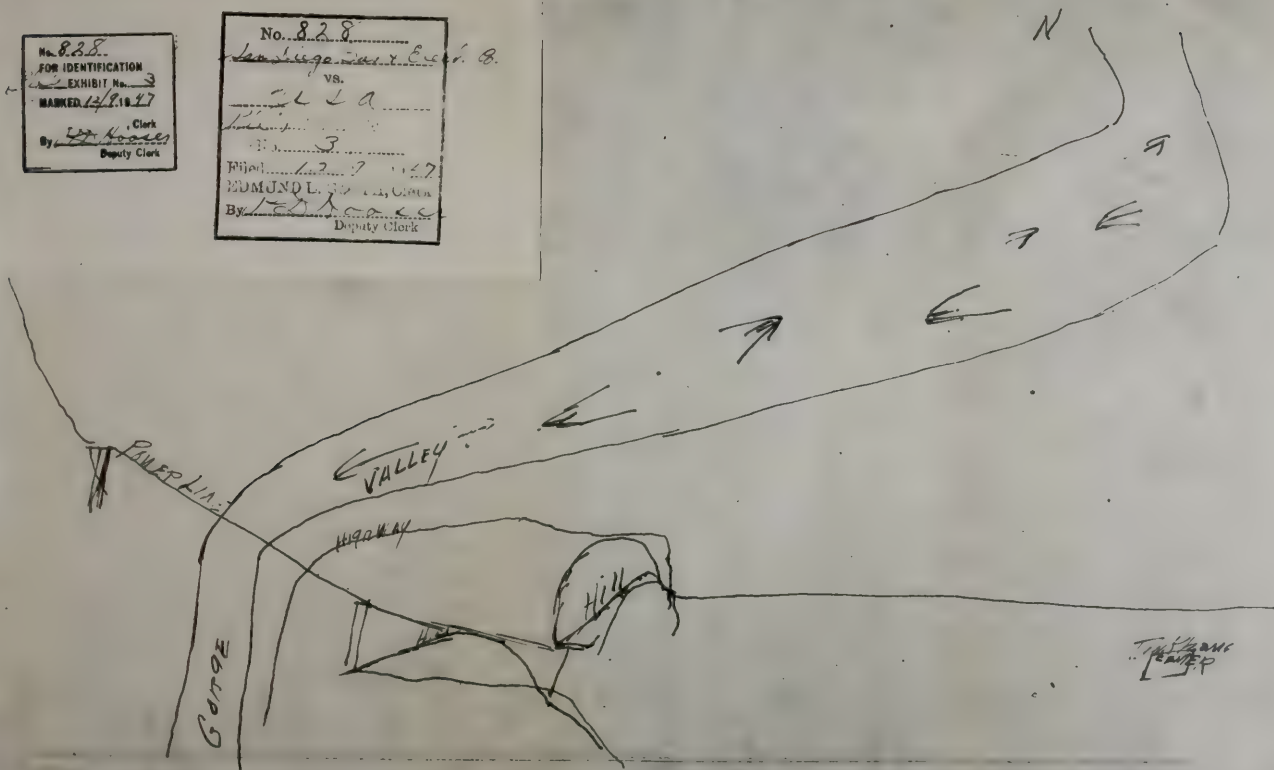






No. 828  
 FOR IDENTIFICATION  
 EXHIBIT No. 3  
 MARKED 12/8/27  
 By H. K. Allen Clerk  
 Deputy Clerk

No. 828  
Lawrence J. Carter  
 vs.  
Al L A  
 Filed 12/8/27  
 EDMUND L. CARTER  
 By Ed L. Carter Deputy Clerk







In the District Court of the United States in and  
for the Southern District of California,  
Southern Division

No. 828-SD Civil

SAN DIEGO GAS & ELECTRIC COMPANY, a  
corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT OF DISMISSAL

The above entitled matter came on regularly for hearing at San Diego, California, on the 8th day of December, 1947, before the Honorable Jacob Weinberger, Judge of the above entitled Court, Luce, Forward, Lee & Kunzel by James L. Focht, Jr. appearing as attorneys for plaintiff, San Diego Gas & Electric Company, a corporation, and defendant, United States of America, appearing by its counsel, James M. Carter, United States Attorney, and Ronald Walker and Reuben Rosensweig, Assistant United States Attorneys, and the Court having heard and received oral and documentary evidence submitted and received on behalf of the plaintiff, and upon the motion of the defendant, United States of America, to dismiss, and the Court having heard oral argument of counsel and being fully advised in the premises, and it appearing to the satisfaction of the Court that plaintiff failed to establish by a preponderance of the evidence that the defendant United States of America, or any of its agents,

servants and/or employees negligently, carelessly and recklessly piloted and operated the said airplane so as to cause it to collide with the plaintiff's [9] transmission lines, and caused the damage alleged in plaintiff's complaint, and that upon the facts and the law the plaintiff has shown no right to relief.

It Is Therefore Ordered, Adjudged and Decreed that said action be and the same is hereby dismissed.

Dated: January 7, 1948.

/s/ JACOB WEINBERGER,  
United States District Judge.

Approved as to Form and Substance:

LUCE, FORWARD, LEE &  
KUNZEL,

By /s/ JAMES L. FOCHT, JR.,  
Attorneys for Plaintiff.

JAMES M. CARTER,  
United States Attorney.

RONALD WALKER,  
Asst. United States Attorney.

REUBEN ROSENSWEIG,  
Asst. United States Attorney.

By /s/ REUBEN ROSENSWEIG,  
Attorneys for Defendant.

Judgment entered and Docketed Jan. 7, 1948.  
Book 13, Page 188. Edmund L. Smith, Clerk; By  
/s/ L. B. Figg, Deputy.

[Endorsed]: Filed Jan. 7, 1948. [10]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the San Diego Gas & Electric Company, a corporation, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of dismissal and the whole thereof entered in this action on the 8th day of January, 1948.

Dated: This 25th day of March, 1948.

LUCE, FORWARD, LEE &  
KUNZEL,

By JAMES L. FOCHT, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed March 25, 1948. [11]

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[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That Maryland Casualty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do business in the State of California, and having an office and place of business in the City of San Diego, County of San Diego, State of California, is held and firmly bound unto the above named United

States of America in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said United States of America, for the payment of which well and truly to be made it binds itself, its successors and assigns, firmly by these presents.

Whereas, on the 8th day of January, 1948, a judgment was entered in the above entitled proceedings;

And the appellant, San Diego Gas & Electric Company, a corporation, feeling aggrieved thereby, appeals to the United States Circuit Court of Appeals for the Ninth Circuit. [12]

Now, Therefore, the condition of this obligation is such that if the aforesaid judgment is affirmed or modified by the Appellate Court, or if the appeal is dismissed, the appellant, San Diego Gas & Electric Company, a corporation, will pay all costs which may be awarded against it on said appeal.

In Witness Whereof, the said Maryland Casualty Company has caused the foregoing instrument to be executed and its corporate seal affixed thereto by its duly authorized Attorney in Fact, at San Diego, California, this 18th day of March, 1948.

MARYLAND CASUALTY  
COMPANY,

By F. F. EDELEN,  
Attorney in Fact. [13]



State of California,  
County of San Diego—ss.

On this 18th day of March, 1948, before me, Frederick David Corbett a Notary Public, in and for the County of San Diego, State of California, residing therein, duly commissioned and sworn, personally appeared F. F. Edelen, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Maryland Casualty Company, the corporation that executed the within instrument and acknowledged to me that he subscribed the name of Maryland Casualty Company thereto as principal and his own name as attorney in fact. I further certify that said instrument was executed by said F. F. Edelen as attorney in fact of Maryland Casualty Company in my presence, and that his signature thereto is genuine.

Witness my hand and seal the day and year in this certificate first above written.

[Seal] /s/ FREDERICK DAVID CORBETT,  
Notary Public in and for said  
County and State.

[Endorsed]: Filed March 25, 1948.

In the District Court of the United States in and  
for the Southern District of California,  
Southern Division

No. 828-SD Civil

SAN DIEGO GAS & ELECTRIC COMPANY, a  
corporation,

Plaintiff and Appellant.

vs.

UNITED STATES OF AMERICA,

Defendant and Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY UPON  
APPEAL

Plaintiff and appellant proposes on its appeal to  
the Circuit Court of Appeals for the Ninth Circuit,  
to rely on the following points as error:

1. The Court erred in granting the motion of  
defendant and appellee for a dismissal of the  
action of plaintiff and appellant.
2. The Court erred in failing to give the plaintiff  
and appellant the benefit of the reasonable in-  
ferences to which it was entitled under the  
evidence.
3. The Court erred in holding that it was not  
established by the preponderance of evidence  
that the damage in question was proximately

caused by the negligence of the defendant and appellee's pilot.

4. The Court erred in not applying the doctrine of Res Ipsa Loquitur. [14]

Dated April 5, 1948.

LUCE, FORWARD, LEE &  
KUNZEL,

By /s/ JAMES L. FOCHT, JR.,  
Attorneys for Plaintiff and  
Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 6, 1948. [15]

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[Title of District Court and Cause.]

STIPULATION DESIGNATING PARTS OF  
RECORD PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN RECORD  
ON APPEAL

It is hereby stipulated and agreed by and between San Diego Gas and Electric Company, plaintiff and appellant, and United States of America, defendant and appellee, by and through their respective attorneys that the following parts of the record proceedings and evidence in said cause are hereby desig-

nated to be included and shall be included in and constitute the record on appeal in said cause:

1. Complaint.
2. Answer.
3. Judgment of Dismissal.
4. Notice of Appeal.
5. Bond for Costs on Appeal.
6. Sketch of Mission Valley and Mission Gorge (Plaintiff's Exhibit No. 3). [17]
7. All testimony and proceedings at the trial contained in the original transcript of testimony prepared by Ross Reynolds, Official Court Reporter;
8. Statement of points upon which appellant intends to rely on appeal;
9. Stipulation designating parts of record proceedings and evidence to be included in record on appeal;
10. Stipulation and order for transmission of exhibits to United States Circuit Court of Appeals for the Ninth Circuit;
11. Clerk's certificate.

It is further stipulated and agreed by said parties that no exhibits introduced in evidence during the trial of said cause in the United States District Court with the exception of the sketch of Mission Valley and Mission Gorge, plaintiff's Exhibit No. 3, need be printed; but that all the originals of said exhibits with the exception of said plaintiff's Exhibit No. 3 to be transmitted to the United States Circuit Court of Appeals may be omitted from said printed record and shall be considered a part of the



record on appeal in their original form though not printed.

Dated this 29th day of March, 1948.

LUCE, FORWARD, LEE &  
KUNZEL,

By /s/ JAMES L. FOCHT,

Attorneys for Plaintiff and  
Appellant.

JAMES M. CARTER,

United States Attorney.

By /s/ REUBEN ROSENSWEIG,

Assistant U. S. Attorney.

Attorneys for Defendant and  
Appellee.

[Endorsed]: Filed March 30, 1948. [18]

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[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANS-  
FER OF ORIGINAL EXHIBITS ON  
APPEAL

It is hereby stipulated by and between San Diego Gas and Electric Company, plaintiff and appellant, and United States of America, defendant and appellee, by and through their respective attorneys, that with the exception of a sketch of Mission Valley and Mission Gorge (plaintiff's Exhibit No. 3), copies of the original exhibits which were introduced in evidence during the trial of said cause need not be included in the record on appeal in said cause, to be filed in connection with the appeal

of said plaintiff and appellant, and that all original exhibits introduced in evidence at the trial of said cause in the above-entitled Court, excepting plaintiff's Exhibit No. 3, may be transferred and transmitted in their original form to the Court to which said appeal was taken; namely, the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal in the above-entitled case and to be used in said appeal. [20]

Dated March 29th, 1948.

LUCE, FORWARD, LEE &  
KUNZEL,

By /s/ JAMES L. FOCHT, JR.,  
Attorneys for Plaintiff and  
Appellant.

JAMES M. CARTER,  
United States Attorney.

CLYDE C. DOWNING,  
Assistant U. S. Attorney.

By /s/ REUBEN ROSENSWEIG,  
Attorneys for Defendant and  
Appellee.

It is hereby ordered that the foregoing stipulation be and it is hereby approved, and it is so ordered.

Dated: March 29, 1948.

/s/ JACOB WEINBERGER,  
Judge.

[Endorsed]: Filed March 30, 1948. [21]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, contain full, true and correct copies of Complaint for Damages; Answer; Plaintiff's Exhibit No. 3; Judgment of Dismissal; Notice of Appeal; Bond for Costs on Appeal; Statement of Points Upon Which Appellant Intends to Rely Upon Appeal; Stipulation Designating Record on Appeal and Stipulation and Order re Exhibits which, together with copy of reporter's transcript of proceedings on December 8 and 9, 1947, and original Plaintiff's Exhibits 1 and 2, transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$5.05 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21st day of April, A.D. 1948.

[Seal]

EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy.

In the United States District Court for the Southern  
District of California, Southern Division

No. 828—Civil

SAN DIEGO GAS & ELECTRIC CO.,

Plaintiff,  
vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Jacob Weinberger,  
Judge presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Appearances:

For the Plaintiff: Luce, Forward, Lee & Kunzel,  
by James L. Focht, Esq., San Diego, California.

For the Defendant: Reuben Rosensweig, Assist-  
ant United States Attorney.

San Diego, California  
Monday, December 8, 1947

The Court: Are you ready in this case?

Mr. Focht: Yes, your Honor.

Mr. Rosensweig: Yes, your Honor. Counsel for  
the plaintiff served me with a copy of his memo-  
randum here and I desire at this time to file an  
original and a copy of my memorandum with the  
court.

The Court: I think we might proceed with the  
pre-trial in this matter.



Mr. Rosensweig: I think, if counsel and I may approach the rostrum here, we can stipulate to many matters.

The Court: Yes.

Mr. Focht: If the court please, this case is brought under the Federal Tort Claims Act and alleges that a Coast Guard pilot negligently operated a plane on the 5th day of September, 1945, and as a proximate result of his negligence, his plane was caused to and did collide with a power line of the plaintiff, causing damage as set forth in the complaint.

The Court: When was this case filed? Was it in 1947?

Mr. Focht: It was filed within one year after the enactment of the Tort Claims Act. I can give you the exact date.

The Court: This accident occurred when?

Mr. Focht: September 5, 1945.

Mr. Rosensweig: The action, your Honor, was filed on February 18, 1947.

The Court: And this legislation was enacted when?

Mr. Focht: August, 1946, your Honor. [2\*]

Mr. Rosensweig: The effective date of the Tort Claims Act is August 2, 1946. It is not an action that is barred by the statute.

The Court: What is the limitation?

Mr. Focht: One year after the enactment of the act or one year after the occurrence itself.

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\* Page numbering appearing at top of page of Reporter's certified Transcript of Record

Mr. Rosensweig: If the claim was filed with the agency involved, the extension is six month after that period.

The Court: You filed this in February, apparently, 1947?

Mr. Focht: Yes, your Honor: that is right.

Mr. Rosensweig: Yes, your Honor.

Mr. Focht: The defendant in its answer has admitted that the Coast Guard pilot named in the complaint was piloting the government plane and has admitted, further, that he was acting in the line of duty, that is, within the scope of his employment. The answer denies that the accident was caused by reason of his negligence, setting up as an affirmative defense that it was an unavoidable accident. Counsel for the government has agreed to stipulate that, if the plaintiff is entitled to recover, it is entitled to recover the amount alleged in the complaint, that is, the government has stipulated that the sum set forth in the prayer is the cost incurred by the plaintiff by virtue of the accident in question. That leaves as virtually the sole issue in the case the question of whether or not the flight in question which [3] resulted in the accident was a negligent flight and whether the government's agent was guilty of negligence.

Counsel has also agreed to stipulate that the Civil Aeronautics regulation in connection with traffic control and minimum safe altitudes, which is quoted in the plaintiff's brief, was applicable to Coast

Guard pilots and that they were bound to the same extent as civilian pilots would be bound.

Counsel has further offered to stipulate——

The Court: What are those heights?

Mr. Focht: I will read the section. It is Section 60.105.

The Court: Is that in your brief?

Mr. Focht: It is, your Honor. It is 1,000 feet over cities, towns and settlements and elsewhere 500 feet, with qualifications.

Mr. Rosensweig: With qualifications on the 500 feet, your Honor.

Mr. Focht: "Except over water or areas where flying at a lower altitude will not involve hazard to persons or property on the surface."

The Court: Where did this occur?

Mr. Focht: This occurred in Mission Valley, at the site of the old Mission dam, I would say about three to five miles this side of Santee. [4]

The Court: This would come in, then, under the 500-foot altitude height, would it?

Mr. Focht: Counsel has offered to stipulate to the height of the wires which were involved in the accident, there being three wires. The lowest wire is 187 feet above the creek bed; the middle wire, 198 feet above the creek bed, and the highest wire 210 feet above the creek bed.

Counsel has further agreed to stipulate to the introduction of several photographs recently taken on the scene. I have these photographs in my possession and perhaps the court would desire, before

proceeding with the evidence, that the photographs be received.

The Court: If it is stipulated to, they may be received.

Mr. Rosensweig: So stipulated, your Honor.

The Court: Do you mean received in evidence at this time?

Mr. Rosensweig: I think it should be for identification.

Mr. Focht: Yes; for identification.

The Court: For identification. How many photographs are there?

Mr. Focht: Two photographs, your Honor. One photograph is taken at a point approximately one mile to the east of the power lines in question. That is the long photograph, composed [5] of three segments. The smaller photographs, in two segments, was taken from a position to the west of the power lines. I am not sure of the exact footage but a matter of perhaps a hundred yards or so.

The Court: Plaintiff's Exhibits 1 and 2.

Mr. Rosensweig: I think it would be well to bring to the court's attention, and I think counsel will stipulate, that the towers on which these wires were strung—that one tower was upon land owned by the City of San Diego and the other tower was upon land leased by private individuals to the San Diego Gas & Electric Company and that the wires themselves strung between the two towers were in the public domain.



Mr. Focht: It is my understanding, your Honor, that part of the wires were across private land and part across land of the City of San Diego.

Mr. Rosensweig: That is correct.

The Court: You say part of it owned by a private individual?

Mr. Focht: That is my understanding; yes, your Honor.

The Court: Leased to the San Diego Gas & Electric Company?

Mr. Focht: Yes, your Honor; and, of course, that the proper franchise existed over the part of the land owned by the city. On the long photograph the towers and the power [6] lines appear but they appear at a great distance and it will be necessary to point out to the court where they appear. On the smaller photograph, if you look against the sky, you can see the wires. They do not stand out too clearly on the photograph.

The Court: They are in the direction or, rather, stretching from these towers?

Mr. Focht: May I approach the bench, your Honor?

(Statement, by Mr. Focht, at the bench, inaudible to the reporter.)

The Court: And, of course, on Exhibit 1 the line is in evidence there, is it not?

Mr. Focht: This is not the line. The line appears around down here. The reason for introducing this exhibit will appear when I call a witness who was standing at the vantage point from which that photograph was taken.



Mr. Rosensweig: I think counsel should make it appear that that heavy line is not the wire we are talking about.

Mr. Focht: That is correct.

The Court: Then, there was no wire when this photograph was taken?

Mr. Focht: Yes, your Honor, but the wire which is so much in evidence has nothing to do with the trial. The wire which is involved appears—or the towers appear on this hill, away down at the extreme left-hand corner. [7]

The Court: This is just——

Mr. Focht: That is a panorama of the contour of the land. There will be testimony, however, in connection with the flight of the plane.

The Court: And it isn't intended to depict a wire or the height there?

Mr. Focht: No, your Honor. It is for the purpose of illustrating certain testimony.

The Court: What about the law governing this matter?

Mr. Focht: The law, I believe, may be succinctly stated in two categories. First, it will be the contention of the plaintiff that the testimony introduced at the trial will establish the negligence of the pilot both as a matter of fact and as a matter of law and that he is negligent as a matter of law by virtue of his falling under the 500-foot minimum, and that he was negligent as a matter of fact by virtue of the nature of his flying and the fact that the accident occurred in broad daylight and the

fact that he was flying at an altitude that was a potential hazard to persons or property, regardless of the existence or non-existence of the regulation.

The next will be in connection with the doctrine of *res ipsa loquitur*. In aviation cases, it is a rather moot one.

The Court: There is no such doctrine applicable in automobile cases, is there? [8]

Mr. Focht: Normally, there isn't.

The Court: It is a question of negligence or not, is it?

Mr. Focht: That is what it is. It is our contention that, in any event, even in the absence of any testimony at all, *res ipsa loquitur* would be applicable. We do not feel that the doctrine of *res ipsa* is necessary to the case.

The Court: I doubt whether it applies in a case of this kind.

Mr. Focht: There is authority both ways. One is a New York case where an airplane collided with an automobile on the highway.

Mr. Rosensweig: I think the preponderance is against the application of *res ipsa loquitur* in airplane cases. I think the authorities, where such doctrine is made applicable, are upon a different theory, that is, the doctrine might be applicable where passengers were involved.

Mr. Focht: The broad principle is, of course, where the instrumentality is solely under the control of a certain person. And, if the accident is one that, in the normal course of events, wouldn't hap-

pen without negligence, then the happening is considered *prima facie* evidence——

The Court: Would it be applicable in a streetcar case?

Mr. Focht: It is applicable in the average streetcar collision case.

Mr. Rosensweig: I believe, your Honor, the cases cited [9] in the trial brief cover that matter. In the case of *Smith vs. Whitney*, 27 Southeastern (2) 442, there is a direct quotation from it to this effect: "The doctrine of *res ipsa loquitur* does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot had no control, it being common knowledge that airplanes do fall without the fault of the pilot." You can have no better statement of the law so far as *res ipsa loquitur* is concerned than that statement there.

Mr. Focht: In California, a Supreme Court case, which is cited in my brief, has applied the doctrine to an airplane crash case. There were two planes coming in for a landing and one plane was riding behind the other plane and collided with it. Judge James, in a case decided in 1935, which is recorded in *U. S. Aviation Reports*, which I have quoted in my brief, did instruct the jury on *res ipsa* that, if they, themselves, felt, as a matter of fact, the collision was one that did not happen unless there was negligence involved, then they could apply the doctrine. In other words, he refused to say the doctrine did apply. He left it up to the jury to

determine whether the type of accident was one not compatible with a lack of negligence. Where, I believe, you have an accident that happens between a plane and a stationary ground object, in broad daylight, the doctrine is just as applicable as it would be to a case [10] of an automobile driving off the road onto private property and damaging a house or something like that. It depends on the particular set of facts. I don't believe you can generalize and say that *res ipsa* does apply to aviation cases or doesn't. I believe it depends upon the case presented.

Mr. Rosensweig: I believe the Court can take judicial notice of the fact that there have been countless numbers of airplanes here recently, where they have never determined the actual cause of the crashes themselves, the crashes having happened in broad daylight. The daylight factor does not seem to make any difference, for instance, where airplanes have crashed against the sides of mountains. An investigation sometimes merely appears to be a cleaning up of the wreckage.

The Court: Is there anything further?

Mr. Focht: Nothing further.

Mr. Rosensweig: Nothing further.

The Court: How about the trial?

Mr. Rosensweig: I think we may proceed with the trial if your Honor desires to hear it at this time.

The Court: We will take a recess.

Mr. Focht: I have but three witnesses and I do not anticipate their total testimony will take very long.

(Short recess.) [11]

(3:40 p.m., Monday, December 8, 1947.)

The Court: You may proceed.

Mr. Focht: The plaintiff will call, as its first witness, Mr. K. R. Tinkham.

### KENNETH R. TINKHAM

a witness for the plaintiff, being first duly sworn,  
was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Kenneth R. Tinkham.

### Direct Examination

By Mr. Focht:

Q. Mr. Tinkham, when you are testifying, keep your voice up so we can all hear you.

A. Yes, sir.

Q. Where do you reside, Mr. Tinkham?

A. At the top of Mission Gorge Valley or in the Mission Valley, at the top of the Gorge.

Q. Can you orient that a little more definitely?

A. It is about three and a half miles west of Santee.

Q. Do you have some kind of a business establishment at that place?

A. Yes, sir; a service station and a small store.



(Testimony of Kenneth R. Tinkham.)

Q. How long have you had this business establishment at that place?

A. I bought it August 7, 1945.

Q. Were you at that establishment on the 5th day of [12] September, 1945? A. Yes, sir.

Q. I show you a photograph, marked Plaintiff's Exhibit 1 for identification, and ask you if you recognize the scene that that depicts.

A. Yes, sir.

Q. Were you present at the time this photograph was taken? A. Yes; I was.

Q. And from what point was this photograph taken?

A. Right in front of my service station.

Mr. Focht: I will offer Plaintiff's Exhibit 1 for identification in evidence.

Mr. Rosensweig: No objection.

The Court: It may be received.

Q. (By Mr. Focht): Returning to the 5th day of September, 1945, did you witness anything of an unusual nature on that date? A. Yes, sir.

Q. And did that episode involve an airplane?

A. Yes, sir.

Q. Did you see this airplane at any time?

A. Yes, sir.

Q. Where were you when you first saw the airplane? A. I was in my store. [13]

Q. What, if anything, first called your attention to the airplane?

A. My dad called it first. He saw the plane come through and told me about this plane coming through so low.

(Testimony of Kenneth R. Tinkham.)

Q. What did you do then?

A. I just looked out and saw it myself.

Q. In what direction, assuming, for the purposes of my question, that Mission Gorge runs in a general easterly and westerly direction—in what direction was the plane proceeding at that time?

A. Easterly.

Q. Referring to Plaintiff's Exhibit 1, can you mark with an "X" the position of the plane when you first saw it?

I will mark this "X-1."

That indicates the position of the plane when you first saw it, is that correct?      A. Yes, sir.

The Court: This indicating the height where it was flying?      A. Yes, sir.

Q. (By Mr. Focht): At what approximate height was the plane flying at that time, if you can give me an approximation?

A. I would say around 200 feet.

Q. The plane traveling at that time was then traveling [14] up the Valley toward your establishment, is that correct?

A. It was going up that riverbed; yes, sir.

Q. Please describe the course taken by the plane from that point on.

A. It went on up this riverbed until it come to a little raise or a hill there and it raised up over this little hill and then turned to the left and went up this canyon and, as soon as it went behind this hill, I couldn't see it any more as it went up this canyon.

(Testimony of Kenneth R. Tinkham.)

Q. Will you please mark with another "X" the point at which the plane changed its course?

The Court: Mark it with something else. This can be "X-2."

Mr. Focht: Yes.

The Witness: He went in this little valley and then he turned to the left.

Q. (By Mr. Focht): That would be in what direction?

A. North, and he went up this canyon there.

Q. Will you draw an arrow to indicate from "X-2" the direction when he turned at that point?

The Court: What does "X-2" signify?

Mr. Focht: "X-2" signifies the point at which the plane changed its course and went north up a canyon and subsequently out of sight. "X-2" is in the extreme right.

The Court: The indication is about the height that you [15] saw that, is it?

A. Yes, sir. As soon as he made this turn, then I couldn't see him any more.

Q. (By Mr. Focht): Did you again, shortly thereafter, see the same plane?

A. He was gone about five minutes and he returned the same route.

Q. Please describe in detail his route when he returned.

A. He came right back through the same place, only he was a little higher when he was at the No. 2 position. He was a little higher there as he came

(Testimony of Kenneth R. Tinkham.)

back across, and he came down about half-way down through the valley. There are trees in there. And then he went back to about the same altitude that he went on; I would say around 200 feet.

Q. What, if anything, occurred thereafter?

The Court: 200 feet from what height?

A. From these trees that are in there. They are cottonwood trees. I imagine these cottonwood trees would be 35 feet high and I figured that he was around 200 feet above these trees.

The Court: Above the trees? A. Yes, sir.

Q. (By Mr. Focht): Incidentally, were you in the service yourself? [16] A. Yes, sir.

Q. Can you describe this airplane?

A. I know that it was a Grumman. I am sure it was. It was a land and sea plane.

Q. It was a service plane? A. Yes.

Q. What, if anything, occurred thereafter?

A. Of course, it went on down out of sight to us then, and, about right after it happened, a man and a lady came in and said that a plane went down; that they were positive it went down. They must have kept right on. And my dad and Mr. Darnell were there and they were down but I didn't go down.

Mr. Rosensweig: I move this testimony the witness has just given be stricken as not responsive to the question.

Mr. Focht: I have no objection to the hearsay going out, as to what somebody else told him.

(Testimony of Kenneth R. Tinkham.)

The Court: I don't know just what was told him and what he is stating of his own knowledge. I think the entire answer may be stricken and you may proceed from there.

Q. (By Mr. Focht): Did you eventually go to the scene of the accident on that day?

A. Later on; yes.

Q. How much later?

A. Probably an hour after it happened, then I went there. [17]

Q. What did you see when you arrived?

A. I just saw the plane. It was laying on its back.

Q. Did it appear to be the plane that you had seen fly over? A. Yes.

Q. Where is your establishment with reference to any power line that crosses Mission Valley?

A. It would be about half a mile, that is, the power line would be about half a mile west of me.

Q. That would be down towards San Diego?

A. Yes.

Q. Will you examine Exhibit 1 and state whether or not you can see the towers or any of the towers of this power line? Will you please mark that position with an "X"? Do not obscure the tower itself with your "X."

The Court: "X-3," is it?

Mr. Focht: That will be "X-3," your Honor.

Q. Your "X-3" is just to the left of the tower, is that right? A. Yes, sir.



(Testimony of Kenneth R. Tinkham.)

The Court: What does that represent, "X-3"?

Q. (By Mr. Focht): It represents one of the tower lines of the power line which you have described, or one of the towers of the power line that you have described as crossing the Gorge, is that correct? [18]

A. Yes, sir.

Q. I show you a photograph, marked Exhibit 2 for identification, and ask you if you recognize the scene it depicts.

A. Yes, sir.

Q. Just state what it describes.

A. The plane would——

Q. Don't get to the plane yet but what general scene or locality does that picture portray?

A. Where this power line comes across the Gorge.

Q. Is this picture taken from the east or the west of the power line?

A. It is taken from the south.

Q. The southwest?

A. Well, right south of it. It goes around this corner to the north here and the power line should come across the road right there.

Q. Do you see the power line appearing against the sky background?

A. Yes, sir.

Mr. Focht: I will offer this as the plaintiff's second exhibit.

The Court: What does this show?

Mr. Focht: That shows the power line crossing the Gorge, a picture taken from the other side from that shown in Plaintiff's Exhibit 1. [19]

(Testimony of Kenneth R. Tinkham.)

The Court: With these two towers we see on the left-hand side of this picture, is that correct?

Mr. Focht: That is correct.

Mr. Rosensweig: May I interrupt, your Honor, and ask counsel a question.

The Court: Yes.

Mr. Rosensweig: How far was this photograph taken from the power line?

Mr. Focht: That I am unable to state.

Q. Where with reference to the power line and wires did you observe the plane when you did arrive at the scene about an hour afterwards?

A. Well, probably 300 feet south of the power lines; maybe more than that. I wouldn't say for sure now. It could be three to five hundred feet south of the power lines.

Q. Where with reference to the center of the Gorge or to the two side towers?

A. The center of the Gorge; the plane was in the center of the Gorge; right in the center of the Gorge.

Q. Did you observe any damage to the power lines or towers?      A. No, sir; not at that time.

Q. Did you at any later time?

A. Yes; I saw where they were spiced right there where they are supposed to have hit. [20]

The Court: Was the line suspended or was it on the ground?

A. At the time I was there, I believe it was being repaired, your Honor. I couldn't get down

(Testimony of Kenneth R. Tinkham.)

there for an hour afterwards and I really didn't pay any attention to the line.

The Court: When you say you didn't see when it was spliced—was it being spliced?

A. No. It is spliced now.

The Court: When you saw it, was it down or up?

A. It was up.

The Court: It was spliced then, was it?

A. Yes; but I don't remember seeing it that day.

Mr. Focht: Counsel isn't making any issue of whether the plane crash caused the damage. It is stipulated the plane crash caused the damage, the amount of which is stipulated. You may cross-examine.

### Cross-Examination

By Mr. Rosensweig:

Q. Mr. Tinkham, how long have you resided up in the area where you reside?

A. August 13, 1945, I moved there.

Q. Have you seen lots of airplanes fly in and out of that Valley? A. Yes, sir.

Q. Did I hear you testify you were formerly a pilot [21] yourself?

A. Yes, sir. Well, I am not a pilot but I was in the service.

Q. You indicated on your direct examination that, when you first observed the airplane in question as it came into the Valley, you saw it at a height of about 200 feet, is that correct?

A. That is right, sir.

(Testimony of Kenneth R. Tinkham.)

Q. How long did you notice it at that particular level?

A. It stayed pretty much to that level going out until it raised up to go over that little knoll.

Q. When it raised up to go over that knoll, how high did it get?

A. I don't believe it cleared the knoll over 200 feet because, as soon as it went around behind, I couldn't see it.

Q. How high is the knoll?

A. From the riverbed, the raise he would have to make?

Q. Yes. A. Well, it is probably 100 feet.

Q. The knoll being 100 feet, he was 200 feet above it, is that correct? A. That is correct.

Q. That would make 300 feet?

A. That is 300 feet. He raised enough to clear this.

Q. You indicated, Mr. Tinkham, as he came back and he [22] flew over certain trees, he was about 200 feet above the trees, is that correct?

A. Yes, sir.

Q. How high were the trees?

A. About 35 feet.

Q. In other words, that would make a total of over 235 feet above the ground?

A. That is about it.

Q. You saw the plane coming into the valley and you saw it traveling at a height of about anywhere from 235 to 335 feet, and then it disappeared around a knoll? A. Yes, sir.

(Testimony of Kenneth R. Tinkham.)

Q. What did you do after it disappeared around a knoll?      A. We sat down on a car fender.

Q. What were you waiting for?

A. We were just sitting there talking.

Q. How long was the plane gone?

A. I would say around five minutes.

Q. You have lived up in this area since when?

A. The fall of 1945.

Q. 1945?      A. Yes.

Q. In other words, you have lived there for about five years?      A. No; three years. [23]

Q. Do you know if there is an emergency landing field up in that area, Mr. Tinkham?

A. The Gillespie airport.

Q. How far is that emergency landing field from the point where this accident occurred?

A. Three miles.

Q. How fast would you say this plane was going at the time you first observed it?

A. 125 miles an hour.

Q. It wouldn't take him very long to arrive at that emergency landing field, would it?

A. No, sir.

Q. Can you describe the emergency landing field, whether it is a large one or small one?

A. It was used as a Marine paratrooper training base. It has two long runways.

Q. In other words, it has been used on several occasions for emergency landing, has it?

A. It could be used; yes, sir.



(Testimony of Kenneth R. Tinkham.)

Q. Have you ever seen any planes land on it?

A. Yes, sir.

Q. On many occasions you have seen planes land when they got into difficulties, is that correct?

A. No.

The Court: Is there any question about Gillespie Field [24] having been used as a landing field.

Mr. Focht: I don't know anything to the contrary, your Honor.

The Court: It has been used and was at that time as an emergency landing field, is that correct?

Mr. Rosensweig: That is my understanding.

Mr. Focht: In addition to other uses. That was not its sole use.

The Court: Go ahead.

Mr. Rosensweig: That is all.

### Redirect Examination

By Mr. Focht:

Q. I have several questions I should have asked on direct examination. About what time did this occur?

A. It was in the afternoon; I couldn't say as to the time; about 2:30 or 3:00 o'clock or something like that.

Q. What was the condition of the weather?

A. It was a clear day.

Q. At any time, while you observed this airplane, did you observe anything unusual about the sound of its motor?      A. No, sir.

(Testimony of Kenneth R. Tinkham.)

Q. Based upon your knowledge of airplane motors and their sounds, it was normal, was it?

A. Normal.

Mr. Focht: Nothing further. [25]

Mr. Rosensweig: No questions.

Mr. Focht: Thank you, Mr. Tinkham. We will call Mr. Tinkham, Sr., Mr. R. H. Tinkham.

### R. H. TINKHAM

a witness for the plaintiff, being first duly sworn,  
was examined and testified as follows:

The Clerk: Will you state your name, please?

A. R. H. Tinkham.

### Direct Examination

By Mr. Focht:

Q. Where do you reside, Mr. Tinkham?

A. I am at the present time residing in Lakeside Park.

Q. And that is in San Diego County?

A. Yes; it is.

Q. Are you related to the witness who has just testified, Mr. K. Tinkham?

A. Yes.

Q. And what is the relationship?

A. I am his father.

Q. Where were you on the afternoon of September 5, 1945?

A. I was at his place of business.

(Testimony of R. H. Tinkham.)

Q. And that is the place of business that he has described as being some three miles or so this side or west of Santee, is that correct? [26]

A. That is right.

Q. Were you in company with anyone else that afternoon? A. A boy.

Q. Refreshing your recollection, Mr. Darnell?

A. Mr. Darnell; yes, sir.

Q. Did you witness anything of an unusual nature that afternoon?

A. I just saw the plane, is all.

Q. Where was this plane when you first saw it?

A. When I first saw it, it was just coming over the hill from San Diego towards Mission Gorge.

Q. Can you estimate its approximate altitude above the earth when you first saw it?

A. That would be hard to do because there were hills in the way and I couldn't see.

Q. Describe its course from that point on.

A. It dropped down into that Mission Gorge and finally came out at the other end of it.

Q. When you first saw it, it was traveling up the Valley, that is, coming from San Diego towards Santee? A. It was.

Q. And then it went up the Gorge and disappeared and went out of sight, is that right?

A. That is right. [27]

Q. When it was coming up the Valley, did it pass in front of you? A. It passed here.

Q. Out north of the building there?

A. Yes.

(Testimony of R. H. Tinkham.)

Q. It passed north of your son's establishment, is that right?      A. Yes, sir.

Q. How far is your son's establishment from the power line that crosses the Gorge?

A. I would say between half and three-quarters of a mile. It is hard to tell.

Q. As it was coming up the valley and passed to the north of the store, could you estimate its approximate altitude above the floor of the valley?

A. I should think about 200 feet.

Q. After the plane disappeared to the north, did you again see it?      A. Yes, sir.

Q. How soon after it disappeared did you see it again?

A. Well, I should think about five minutes.

Q. Where was it when you saw it?

A. It turned around and was coming back down Mission Valley again.

Q. As it came down Mission Gorge towards San Diego, can [28] you estimate its approximate height above the floor of the valley?

A. I think it was practically the same, about 200 feet.

Q. At any time while the plane was in your sight, did you hear anything unusual about the noise of its motor?      A. No; I did not.

Q. What time approximately was it when you saw this plane?

A. Oh, it was about the middle of the afternoon.

Q. What kind of a day was it?

A. A clear day.

(Testimony of R. H. Tinkham.)

Q. What occurred after you saw the plane on this second occasion?

A. Well, it went down the valley and started up the canyon again.

Q. When you say started up the canyon, in what direction?        A. Towards San Diego.

Q. Then what occurred?

A. Well, it disappeared out of sight and a couple, a man and his wife, came in and said they were sure that plane went down over there.

Mr. Rosensweig: I move that answer be stricken as not responsive.

The Court: It may be stricken. [29]

Q. (By Mr. Focht): After the plane went out of sight, did you go anywhere?

A. I went down to where it fell.

Q. How long after the plane went out of sight was it that you went down there?

A. I think I was there five minutes at least after it fell; not any more than five minutes.

Q. What did you observe when you went down to where you went?

A. The plane was lying on its back in the middle of the canyon.

Q. Where with reference to the point at which the power line crosses the Gorge?

A. Towards San Diego.

Q. How far from the place where the power line crosses?

A. Just estimating it, I would say 400 feet.



(Testimony of R. H. Tinkham.)

Q. Did you go down to the plane?

A. We drove down as far as we could along the road and then walked down.

Q. Did you examine the plane?

A. No; I did not.

Q. Did you make any kind of an observation of the power line equipment?

A. I see a line was broken and the line laid on the side of the road. [30]

Q. Can you say whether that was the lower or middle or the upper line?

A. I couldn't say.

Mr. Focht: You may cross-examine.

Mr. Rosensweig: No questions.

Mr. Focht: Mr. Darnell.

### FRANK DARNELL

a witness for the plaintiff, being first duly sworn,  
was examined and testified as follows:

The Clerk: Will you state your name, please.

The Witness: Frank Darnell.

### Direct Examination

By Mr. Focht:

Q. Where do you reside, Mr. Darnell?

A. San Diego; 4222 Cherokee.

Q. Are you employed at the present time?

A. Yes, sir.

Q. Where are you employed?

A. At Consolidated.

(Testimony of Frank Darnell.)

Q. That is the Consolidated-Vultee here, is it?

A. Consolidated-Vultee.

Q. How long have you lived in the San Diego area?

A. 25 years.

Q. Are you familiar with the establishment of Mr. Tinkham's up in Mission Gorge? [31]

A. Yes, sir.

Q. Were you in the vicinity of that establishment in the afternoon of September 5, 1945?

A. Yes, sir.

Q. Were you in the company of Mr. Tinkham, Jr., and Mr. Tinkham, Sr., on that afternoon?

A. Yes, sir.

Q. Did you observe anything of an unusual nature that afternoon?

A. I saw a Grumman Widgeon approximately 200 feet off of the terrain.

Q. Grumman Widgeon is——

A. It is a two-motored airplane or a two-engined airplane, I should say.

Q. When you first saw this airplane, where was it with reference to Mr. Tinkham's establishment?

A. North of his establishment approximately 300 yards.

Q. And it was going in a direction toward or away from San Diego?

A. Going east, away from San Diego.

Q. Flying at about 200 feet at that time?

A. Approximately; yes, sir.

(Testimony of Frank Darnell.)

Q. Where did the plane go after you first saw it?

A. The plane went east perhaps a half a mile or better and turned north. It turned north behind a little [32] raise there, which is not very high, and went up that way and went out of sight.

Q. Did you again see the airplane?

A. The airplane returned not long after that and flew back through the valley.

Q. When it flew back through the valley, did it pass in front of or to the north of Mr. Tinkham's establishment?

A. North and in front of the establishment?

Q. What was its approximate altitude at that time?

A. He came back to approximately the same altitude.

Q. About 200 feet above the terrain?

A. Yes, sir.

Q. Then what, if anything, occurred?

A. He turned south through the Gorge and then it was out of sight.

Q. After it went out of sight, did you have occasion to go to the scene of the power line that crosses the Gorge?

A. Yes, sir.

Q. Did you go in anyone's company?

A. Mr. Tinkham, Sr.

Q. About how long after the plane went out of sight did you depart for the scene of the power line?

A. Not over three minutes.

(Testimony of Frank Darnell.)

Q. What, if anything, did you observe when you went to this point? [33]

A. I observed this aircraft laying on its back.

Q. Where with reference to the power line?

A. South, and in the middle of the Gorge, about 200 yards.

Q. Did you go down and examine the plane?

A. Yes, sir.

Q. What, if anything, did you observe?

A. There was a man walking around the ship at the time, and I heard he was involved in the crash, and I asked him if he was and he said no, and I looked in the ship and couldn't see anyone, and I was under the impression that he was. And then I examined the plane more carefully and I saw where I could see one fellow's arm right down in the nose. And I said to this gentleman—I didn't get his name—I wondered if they were still alive and I felt of this fellow's arm but there was no pulse.

Q. Were you there when the occupant or occupants were removed from the plane?

A. No; I wasn't. And as soon as the Navy came down, they asked everyone to leave the territory.

Q. During any time when you saw this airplane in flight, did you observe anything unusual about the noise of its engine or engines?

A. No. The aircraft was in fine condition as it went by both times, as far as I could tell. [34]

Mr. Focht: You may cross-examine.

(Testimony of Frank Darnell.)

Cross-Examination

By Mr. Rosensweig:

Q. Mr. Darnell, you indicated that this was a Grumman Widgeon? A. Grumman Widgeon.

Q. Will you describe what kind of a plane that is?

A. It is a two-engined airplane; two Pratt and Whitney engines I believe they are.

Q. How closely did you examine that airplane when you went down?

A. Very closely. However, I didn't look at the name plate to determine it was a Grumman Widgeon. I determined that when it went over.

Q. You couldn't be mistaken about that, could you?

A. Not as far as it being a Grumman Widgeon.

Q. Where did you indicate you worked?

A. At the Consolidated.

Q. You are pretty well acquainted with planes, aren't you? A. Fair. My work is motor work.

Q. In other words, you are able to determine the speed of airplanes in flight and all that sort of thing?

A. No; but you can estimate anything from a mile to a hundred. [35]

Q. Are you able to estimate speeds, generally speaking, of airplanes? A. Yes.

Q. Are you able to estimate at this time how fast the plane was going at the time this accident was involved?



(Testimony of Frank Darnell.)

A. I would say he was doing a little better than a hundred; 120.

Q. 120 miles an hour? A. Yes, sir.

Q. After the plane disappeared around this knoll, how long was it gone?

A. On its flight east?

Q. Yes; on its flight away from Mr. Tinkham's place of business. A. Three to five minutes.

Q. Did you wait for it to come back?

A. No, sir. We were sitting in front of Mr. Tinkham's establishment talking at the time and we saw it as it came back, and I made the remark then that that plane was sure flying awfully low through that area.

Q. You have seen planes fly up that Gorge dozens of times, haven't you? A. Yes, sir.

Mr. Rosensweig: No further questions.

Mr. Focht: Nothing further. Counsel for the Government [36] has offered to stipulate that the plane involved in the accident had been dispatched and was operated from the Coast Guard Air Station here on San Diego Bay. Is that correct?

Mr. Rosensweig: That is correct. It was dispatched from San Diego here and was on a regular routine training flight.

Mr. Focht: The plaintiff rests, your Honor.

Mr. Rosensweig: At this time, your Honor, the Government would like to make a motion to dismiss for the reasons set forth in the trial brief that we have just filed, on the grounds that the complaint

heretofore filed by the plaintiff, and paragraph 4, particularly, alleges that "Ferrin piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with the plaintiff's transmission line."

I submit, your Honor, that, from the testimony of these three witnesses, there is not one iota of testimony or evidence presented that the pilot of this plane operated the plane in a negligent, careless and reckless manner. The plaintiff, before it can be permitted to recover, must show by a preponderance of the evidence that the pilot was guilty of negligence and that he operated that plane in a careless and negligent manner. I submit that none of the testimony of the three witnesses indicated, in any way, shape or form, that such was the situation. They merely testified that this plane [37] proceeded up the valley at a particular height. The height has been varied here from 235 feet to 335 feet, I believe. We submit that an airplane, traveling in an open and sparsely settled country of that character, is not bound, under the regulations as herein indicated, to travel at an altitude of 500 feet.

Section (b), and I am reading, your Honor, from page 2 of the plaintiff's trial brief, says, "(b) When elsewhere than as specified in paragraph (a), at an altitude of not less than 500 feet, except over water or area where flying at a lower altitude will not involve hazard to persons or property on the surface." I submit, your Honor, that, if you will examine the photographs — a camera taking that

particular photograph has been unable to show with clarity, in any way, shape or form, that those wires were strung across that Gorge and that was the particular reason I asked how far back from the wires was Exhibit No. 2 taken, and I received no answer; they didn't know. Exhibit No. 2, assuming that it was taken practically upon the wires themselves, shows them very, very faintly in there. It is almost an impossibility to say those wires were there.

They say this accident happened upon a clear day and, under the circumstances, they should have been able to see the wires. I submit that a photograph that was taken comparatively close to the towers themselves, and the photograph it appears was taken extremely close, Exhibit 2, I believe, [38] was unable to discern the wires, and I can't understand how the human eye, flying in an airplane, could discern the wires.

The only basis I can see, your Honor, upon which the plaintiff can recover is upon the theory of *res ipsa loquitur* and we discussed that here a while ago. I am satisfied that the authorities are more than ample that the mere happening of this accident is no proof that the pilot was guilty of negligence because the authorities are clear that the doctrine doesn't apply because there are any number of reasons why an airplane will fall. I think the Court can take judicial notice of the fact that here recently we had a terrific airplane accident, where some 52 passengers were killed. A fire broke out in the

tail of that particular plane. It was unexplained and nobody happens to know how that fire actually started. It is a different situation than this particular case because there you had the question of liability of an airplane company to its passengers. In that particular case, the doctrine might apply because passengers were being carried.

I think this case is analogous to an accident that happens upon the highway, where it is unexplained. I say that this accident falls within that same category. It might be said that the plaintiff in this case might have been guilty of contributory negligence if we want to draw our own conclusions from a particular state of facts because, in constructing those [39] towers, the company could just as well have put them underground. But, in constructing them above the ground, they could equally as well have anticipated that there were thousands of airplanes flying in and about San Diego and, in constructing those wires, that they could have anticipated that such a situation might occur and that an airplane might get into trouble; that an engine might fail or almost anything might happen to it.

I am not an airplane enthusiast and know little or nothing about them but I do know there are things that happen to airplanes that are absolutely unexplainable.

So, under those circumstances, your Honor, with the situation being that the doctrine of *res ipsa loquitur* does not apply — I am convinced that it doesn't apply by reason of the great weight of au-



thority, the burden falling upon the plaintiff to show by a preponderance of the evidence that this pilot was guilty of negligence and carelessness and the unlawful operation of the plane. He has failed to show that by the preponderance of evidence required under the law and this case must be dismissed. There isn't a witness who has testified yet how high the plane was flying in the vicinity of this power line. They said the plane disappeared.

Mr. Focht: If the Court please, the power line can be pointed out on Plaintiff's Exhibit 1, the tower of the power line. This is the tower, one of the towers, that crosses the [40] valley, the other tower being over on this side, and this is the point this was taken, at the point at which the witnesses Tinkham and Darnell were standing. So it shows that the plane must have barely been out of sight because one of the towers is visible. And the testimony is the power line is from one-half to three-quarters of a mile from the point at which the Tinkhams were standing and, therefore, when the accident occurred, it must have been almost instantaneous.

The Court: Suppose the plane had dropped on this power line. Suppose it was up 1,000 feet and had dropped. Nobody seems to have followed the airplane to where the accident occurred.

Mr. Focht: That, coupled with the stipulation it was the plane involved in the accident, and that they immediately left for the scene or about five



minutes after the plane had disappeared from view, and the plane was there on the ground—the inference or the fact is inescapable that it did not turn around and come back.

The Court: There is no question but what the plane hit the power line. But how high was the plane above the power line? No one is being tried for a violation of an ordinance or the aeronautics rules.

Mr. Rosensweig: There is testimony in the record that the plane was 235 feet or 335 feet—above what? How do I know and how does this Court know that the place of business [41] of the Tinkhams wasn't four or five hundred feet above the level ground itself?

The Court: Assuming that the plane was flying 200 or 235 or 335 feet from where these witnesses saw the plane, they all said that the plane came back and then disappeared and then, a few minutes later, they heard about this crash; that somebody told them about it. They didn't even hear the crash. No one has told us how high the plane was flying at the time of this crash. It might have flown a few feet or might have flown a hundred feet above where the crash occurred. Can I assume from the evidence that the plane was flying low at this particular point; that it was flying low at the point where the impact was?

Mr. Focht: Certainly, your Honor, it is the more reasonable inference to draw than any other inference that can be drawn.

The Court: It is up to you to prove your case not by inference but by facts.

Mr. Focht: May we recess at this time until tomorrow morning, your Honor?

The Court: Yes. I would like to hear further from you. I am not pre-judging the case but it seems to me you will have to meet the issue squarely of the position of the plane at the time of the impact, if you can. We will take a recess until tomorrow morning at 10:00 o'clock. [42]

(Whereupon, a recess was taken until 10:00 o'clock a.m., Tuesday, December 9, 1947.) [43]

San Diego, California,  
Tuesday, December 9, 1947, 10:00 A.M.

(Case called by clerk.)

Mr. Rosensweig: Ready to proceed in that matter.

Mr. Focht: Ready. If the Court please, at this time I will ask leave to reopen the plaintiff's case to ask a very few more questions from two of the plaintiff's witnesses who have already testified. Counsel has stated he has no objection and I don't think we will take long.

The Court: Very well.

Mr. Focht: Mr. Tinkham, Sr.

## R. H. TINKHAM

a witness on behalf of the plaintiff, being previously duly sworn, was recalled and testified further as follows:

## Direct Examination

By Mr. Focht:

Q. Mr. Tinkham, you testified on direct examination yesterday that, when you saw the plane come back to the north of your son's establishment, headed towards San Diego, it entered the Gorge and passed out of your vision and that shortly thereafter you departed for the scene of the power line that crosses the Gorge. Now, after the plane came into your vision on that occasion, in what direction did you look up till the time that you set out for the scene of the power line? [44]

Mr. Rosensweig: I object to that question, your Honor, as being incompetent, irrelevant and immaterial. It is a compound question and I don't believe that it is proper redirect examination.

The Court: Will you repeat that, please?

(Question read by reporter.)

Mr. Focht: I will withdraw the question and reframe it.

Q. Mr. Tinkham, from the time the plane passed out of your vision headed towards San Diego, until you left your son's establishment to go to the power line, in what direction did you look?

A. I was watching for it to come out of the Gorge.

(Testimony of R. H. Tinkham.)

The Court: That wasn't an answer to your question, was it?

Mr. Focht: Yes, your Honor.

Q. By that do you mean you were looking in the direction of the Gorge? A. Yes.

Q. From your vantage point where you were standing at your son's establishment, could you have seen the plane if it did come up out of the Gorge?

Mr. Rosensweig: I object to that question as being incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

The Court: The objection is sustained. [45]

Q. (By Mr. Focht): Did you see the plane come out of the Gorge at any time before you left for the scene of the power line? A. No, sir.

Q. Where is the east entrance of the Gorge with reference to the power line? Is the question clear? Where does the Gorge begin with reference to the power line?

A. Well, practically where the uower line is, you might say; maybe a little bit before that but right in there.

Q. Do you mean that the power line crosses the Gorge at or near the east end of the Gorge?

A. Just about there; maybe a little bit—it may run down a little bit further but not to amount to anything.

Q. Do you mean the entrance may run a little to the west or east? A. East.

(Testimony of R. H. Tinkham.)

Q. How long after the plane disappeared into the Gorge was it before you started out for the power line?

A. Oh, I should think between one and two minutes.

The Court: One or two minutes?

A. Some place in there.

Mr. Focht: Nothing further.

### Cross-Examination

By Mr. Rosensweig:

Q. Mr. Tinkham, you say you started for the power line [46] one or two minutes after the airplane disappeared from your sight, is that correct?

A. That is it.

Q. Did you hear any explosion?

A. No, sir.

Q. Did you hear any impact? A. No, sir.

Q. Did you hear any noise of any nature or description that would compel you to have started from your son's establishment to the power lines in question here in one or two minutes?

A. I didn't hear any explosion; no.

Q. What compelled you to go to the power lines in one or two minutes?

A. The party that drove in there said they were positive that the plane crashed.

Q. Didn't you testify yesterday you didn't start for the scene of the power lines until five or ten minutes after the people had come to your son's



(Testimony of R. H. Tinkham.)

establishment and told you that there had been an accident down at the power lines?

A. I don't think so.

Q. How far is your son's establishment from these power lines?

A. I should say between half and three-quarters of a mile. [47]

Q. Didn't you walk? A. No, sir.

Q. You drove? A. Yes, sir.

Q. What kind of a car did you use?

A. Mr. Darnell's car.

Q. You followed Mr. Darnell's car?

A. No; I rode with him.

Q. You rode with him? A. Yes, sir.

Q. When you arrived at the scene of the accident, were the wires up or down?

A. I didn't understand you.

Q. When you arrived at the scene of the collision, were the power lines up or down?

A. They were down.

Q. Had they been spliced yet? A. No.

Q. They were still down on the ground?

A. Yes, sir.

Q. Had any other parties arrived when you arrived there? A. There was one man there.

Q. Do you know who he was?

A. All I know, he was dressed as an aviator. [48]

Q. He was dressed as an aviator? A. Yes.

Q. Did you inquire who he was? A. No.

Q. Do you know what kind of uniform he wore?

A. No; I wouldn't say that.

(Testimony of R. H. Tinkham.)

Q. Was he a member of the military forces of the United States? A. Yes, sir.

Q. He was already there? A. Yes, sir.

Q. How long after you arrived at the scene of the accident did the members of the military forces arrive and tell you to get out of the area?

A. Quite a while. I couldn't say exactly. I should think about a half-hour later. It might have been longer.

Q. How far is it, again, from your son's establishment to the power lines in question?

A. Half to three-quarters of a mile. That is my estimate of it.

Q. And, after the plane had passed your son's establishment, you lost sight of it, isn't that correct?

A. Yes, sir; after it went up the Gorge we lost sight of it.

Q. You lost sight of it? [49] A. Yes.

Q. And you didn't see it after that?

A. No.

Mr. Focht: That is all.

The Court: Just a minute. Was your vision pretty good that day? A. Yes, sir.

The Court: How far could you observe this plane as it was up in the air? How many miles would you say the plane was in sight at any time that you saw it, at the farthest point from where you were standing or sitting?

A. Well, when it went up the Gorge and went up over the hill, I should think it would be probably

(Testimony of R. H. Tinkham.)

a couple of miles away when it went out of sight.

The Court: When you say it was going up the hill——

A. When it went up over the hill and turned out of our sight and turned around came back again.

The Court: You could see it two miles away?

A. I should think so.

The Court: When it was going in the other direction towards San Diego, that was just before the plane turned around, is that correct?

A. That was when it first came over. It came over and came up the Gorge and then up the valley and then went up over this hill and turned around and went out of sight over [50] that hill and turned around and came back.

The Court: In which direction was it going when it came back?

A. After it got down in the valley, it was going west.

The Court: Going towards San Diego?

A. Yes.

The Court: As it was going towards San Diego, how far could you see the plane before it disappeared?

A. When it went up the gorge, about half or three-quarters of a mile away.

The Court: Why couldn't you see it farther than that?

A. Because there was hills between.

The Court: So that is why it disappeared?

A. Yes, sir.

(Testimony of R. H. Tinkham.)

The Court: Did it go up and go over the hills?

A. No; it went on up the Gorge. The hills are—you come down the valley and turn to go up that Gorge and there is a hill on the side of it.

The Court: How high would you say that hill was from the level of the ground, in the immediate vicinity of the hills?

A. Will you repeat that question?

(Question read by reporter.)

A. Well, right where it went out of sight, it isn't—I don't think it would be a hundred feet but, after it come up the canyon, it went up to four or five hundred feet probably. [51]

The Court: Which hill are you talking about when it disappeared from sight, the short hill or what?

A. The short hill, the hill that is between this canyon and my son's place.

The Court: Then, he could go over the hump by traveling at the height that you say he traveled and go over the top of that hill, could he?

A. No; I don't think he could.

The Court: What is your judgment as to the height that he had to travel to get over that hill before he disappeared from sight?

A. He didn't come over that hill to go out of sight. He followed around to the side of that hill and started up the Gorge.

The Court: Maybe I don't understand your testimony.

(Testimony of R. H. Tinkham.)

Mr. Rosensweig: May I ask him about it, your Honor? I show you, Mr. Tinkham, Plaintiff's Exhibit No. 1. Will you show me any hill in that picture that is under 500 feet high?

Mr. Focht: You might ask him if he has oriented the picture.

Q. (By Mr. Rosensweig): You recognize the picture, don't you?

A. I just saw it here yesterday. [52]

Q. You are acquainted with the hills that appear in the picture, are you?

A. I can't say that I am.

Mr. Rosensweig: I withdraw the question, then, your Honor.

Q. Mr. Tinkham, the fact remains, does it not, that, once after this airplane passed your son's establishment to go up the Gorge towards San Diego, once it passed you, you didn't see it thereafter?

A. N6, sir.

Mr. Rosensweig: That is all.

### Redirect Examination

By Mr. Focht:

Q. Just a moment. Mr. Tinkham, can you state approximately how far the position in which the plane left your view was from the power line? Is that question clear?

Mr. Rosensweig: Just a moment——

Q. (By Mr. Focht): Is the question celar?

A. I think it is.



(Testimony of R. H. Tinkham.)

Mr. Rosensweig: I object to the question as calling for a conclusion of the witness and as incompetent, irrelevant and immaterial.

The Court: What is the question?

(Question read by reporter.)

The Court: I don't think I understand the question myself. [53]

Mr. Focht: The question, your Honor, I am asking him is the position at which the plane left his vision, that is, when it went around the hill say a certain distance from the power line. In other words, how far would the plane have traveled from the time it went out of his sight until it reached a position even with the power line.

The Court: The position in which it disappeared from view?

Mr. Focht: In other words, how far would the plane have traveled after it left his vision until it reached a position even with the power line.

The Court: If he knows.

Do you know how far it is from the point where you say the plane disappeared to where the power line is?

Q. (By Mr. Focht): Your best approximation, if you have one.

A. I should say around 400 feet. I am not going to say that is exact. It might have been 300 or it might have been 600 but I would figure around 400 feet.

(Testimony of R. H. Tinkham.)

The Court: You don't know, though, do you?

A. No; I couldn't swear to it.

Mr. Focht: I have no further questions.

Mr. Rosensweig: I have no further questions.

Or might I ask the witness an additional question, your Honor?

The Court: Yes. [54]

### Recross-Examination

By Mr. Rosensweig:

Q. After the airplane left your vision and you lost track of it, you don't know what it did after that, do you?

A. No; I don't know what it did.

Q. You don't know whether it flew around for 10 or 15 minutes thereafter or two or three minutes, do you?

A. I know it didn't fly five minutes.

Q. In other words, for five minutes you don't know what the plane did? In other words, after it disappeared from your vision, you have no idea what the plane did?

A. Till we got there; no.

Mr. Rosensweig: That is all.

The Court: I think you testified yesterday that you got there in about five minutes?

A. Well, as near as I could tell; yes. It was inside of five minutes.

The Court: You said yesterday, I think, that you were there about five minutes after the plane fell? A. Yes.

(Testimony of R. H. Tinkham.)

The Court: Did you know that the plane had fallen at all until you were told about it?

A. Not until—well, I was stopped from answering that question yesterday—not until that party come and told me the plane had fell. [55]

The Court: That is the only way you knew it?

A. That is the only way I knew it.

The Court: Let me have that exhibit again. What does “X-1” represent?

Mr. Focht: May I approach the bench?

The Court: Yes.

Mr. Focht: I think I can recall that. “X-1” represents the position at which Mr. Tinkham, Jr., first saw the plane as it was coming up the valley away from San Diego. “X-2” represents the position at which the plane disappeared on this trip up over the hill. Then it circled and came back by the establishment again. And “X-3” is one of the towers of the power line which extends across the Gorge. The entrance to the Gorge is at the extreme left of the picture. There is another tower. The power line would extend across here and there would be a point at which the power line was obscured. In other words, as soon as the plane reached a position about there, it would pass out of sight.

The Court: And that is by reason of this hill here?

Mr. Focht: That is right. From the appearance of these two towers, it would appear that the power line would cross to a position about there.

The Court: Where are the towers?

(Testimony of R. H. Tinkham.)

Mr. Focht: There is one of the towers. If we had a magnifying glass, I think it would be a little easier. Here [56] is the second tower and there are towers on the other side, which do not appear.

The Court: If the plane disappeared—apparently, it disappeared, having gone over the towers, is that correct?

Mr. Focht: The line extends across the valley. Here is the bare tip of another tower on the other side. So the wire slopes there. And there would be a point at which the plane would pass out of vision.

The Court: Yes, but it must have gone over the tower at this point to have cleared——

Mr. Focht: This part of the line but that is not where the line is suspended across the canyon. In other words, if this hill could be removed, you would see the line extended across.

The Court: Was it necessary for him to go over that tower at any point before he disappeared?

Mr. Focht: No, your Honor, that is, if he flew down here, he would be obscured by this hill before he reached the line and towers on this side, as is witnessed by the fact that the line and towers on this side cannot be seen. I think I can perhaps make it more clear through a sketch with the witness Tinkham, Jr. Here are the towers on this side. It comes across here over to the other side of the valley.

The Court: Is this the Gorge?

(Testimony of R. H. Tinkham.)

Mr. Focht: The Gorge is back this way. This is the entrance [57] to the Gorge.

The Court: At all events, that is all you know about it, isn't it?

The Witness: Yes, sir; it is.

Mr. Rosensweig: I have one or two more questions, your Honor.

### *Cross-Examination*

By Mrs. Rosensweig:

Q. Did you have any conversation, Mr. Tinkham, with the people who came and told you that there had been an accident up the valley a bit?

A. They just stopped long enough to say they were certain a plane went down and they drove off.

Q. What did they tell you?

Mr. Focht: That is objected to as hearsay.

Mr. Rosensweig: I will withdraw the question. No further questions.

Mr. Focht: You may step down. Mr. Tinkham, Jr.

### KENNETH R. TINKHAM

a witness on behalf of the plaintiff, being previously duly sworn, was recalled and testified further as follows:

### *Direct Examination*

By Mr. Focht:

Q. Mr. Tinkham, for the purpose of the record and for the purpose of illustrating your testimony,



(Testimony of Kenneth R. Tinkham.)

I am going to [58] ask if you will draw a little sketch on this tablet.

Mr. Rosensweig: Draw it on the board.

Mr. Focht: The only trouble is that would require a photograph to get it in the record. We could have a copy made, which we could stipulate is a reasonably accurate copy, on the blackboard, and I would have no objection to that.

Mr. Rosensweig: I believe, your Honor, we will object to the question and to the witness drawing a diagram. The photographs speak for themselves. I see no useful purpose in the witness drawing a diagram that is not drawn to scale, which is his own opinion as to what is there and what isn't there. I am going to object to the question as being highly irregular and incompetent, irrelevant and immaterial.

Mr. Focht: If the court please, it is a well-settled rule of evidence that a witness may draw a sketch or diagram to illustrate his testimony. It is not offered for the purpose of being a scale drawing but purely for the purpose of clarity and the purpose of illustrating his testimony.

The Court: We are just going round and round. You had your opportunity yesterday to present your case and I permitted you to call Mr. Tinkham, Sr., back, and now you want to go back into the main case again. Is that it?

Mr. Focht: It was with counsel's permission to reopen the case.

(Testimony of Kenneth R. Tinkham.)

Mr. Rosensweig: I only agreed to that for certain clarifying [59] questions; not for additional evidence.

Mr. Focht: It is just what this question is, for the purpose of clarification.

Mr. Rosensweig: I object, your Honor——

The Court: What is it you are trying to establish now?

Mr. Focht: The relationship of the power line to the position at which the plane passed out of the sight of the witnesses. It is a very important question in view of the time element involved.

The Court: You may go into that.

Q. (By Mr. Focht): Will you please draw on this piece of paper a sketch showing the section of the valley which contains your business establishment and the Gorge and the power lines and, after you draw it, we will label it for the purposes of illustration. You have mentioned a hill which you have stated, on your examination yesterday, obscured your view. Please draw the hill in. Will you please label Tinkham's Center, if it appears on that diagram, and please label the power line if it appears in the diagram and please label the Gorge. What does this line represent?

A. That is the highway.

Q. Please label that "highway." Please label the hill. Is that the hill that you have referred to as obscuring your vision of a portion of the power line?

A. Yes, sir. [60]

(Testimony of Kenneth R. Tinkham.)

The Court: First, you might have him draw the diagram and then have him mark each place and inquire about it, so we will have something in the record.

Q. (By Mr. Focht): Will you please place north at its directional point on the map? You have now marked on this paper, upon the plat that you have drawn, Tinkham's Center. Does that represent—

Mr. Rosensweig: May I see the diagram first?

Mr. Focht: Surely.

The Court: You might mark on there also the course of the plane, with arrows, when it first came up the canyon and then when it came back again and went back towards San Diego.

Mr. Focht: Very well, sir.

Q. In response to the court's suggestion, will you please mark the course of the plane as it came up the valley and then as it came back?

The Court: With arrows.

Q. (By Mr. Focht): With arrows, so that we can indicate its direction.

The Court: So we can follow its course.

Q. (By Mr. Focht): Can you extend the shaft of the arrow a little further in each case? Does the rectangle marked with the legend "Tinkham Center" represent the establishment where you were when you saw the plane, according to your testimony? [61]

A. Yes, sir.

(Testimony of Kenneth R. Tinkham.)

Q. And the Gorge to which you have referred in your testimony is marked with the legend "Gorge" on the map? A. Yes, sir.

Q. And "valley" represents what?

A. The valley, with the riverbed in it.

Q. Mission Valley? A. Yes, sir.

Q. And you have labeled "power line" on the legend as representing the power line which you have mentioned in your testimony?

A. Yes.

Q. And the semi-circle marked "hill" is the hill that you have mentioned as obscuring your vision of the plane after it returned on its way to San Diego? A. Yes, sir.

Q. And the line of arrows which points in a generally easterly direction represents what?

A. The plane going out.

Q. That is, the plane going away from San Diego? A. Yes, sir.

Q. The line of arrows in a general westerly direction represents what?

A. The plane returning.

Mr. Focht: We will offer this in evidence for the purpose [62] of illustrating the witness' testimony.

The Court: It may be received and marked Plaintiff's Exhibit 3.

Q. (By Mr. Focht): Approximately how far were the power lines from the position of the plane where it passed, when it passed, out of your sight on the way towards San Diego?

(Testimony of Kenneth R. Tinkham.)

Mr. Rosensweig: We object to that question as calling for the conclusion of the witness.

Q. (By Mr. Focht): If you can give us a fair estimate.

The Court: If he knows.

A. From the plane, that would pass over the power lines.

Q. (By Mr. Focht): From the place where the plane left your sight to the position where it would be even with the power lines?

The Court: Do you mean where the accident occurred?

Mr. Focht: Yes.

A. I would say around five or six hundred feet.

Q. After the plane passed out of your vision, in what direction were you looking?

A. We watched that direction to see if it came up.

Q. Did you see it come up? A. No, sir.

Q. On cross-examination, counsel for the government [63] asked you if you had seen planes flying up Mission Valley. I will ask you if you have ever seen any planes, prior to this one, flying in or out of the Gorge? A. No, sir.

Mr. Focht: You may cross-examine.

### Cross-Examination

By Mr. Rosensweig:

Q. After the plane, Mr. Tinkham, disappeared around these hills, you didn't see it thereafter, did you? A. No, sir.



(Testimony of Kenneth R. Tinkham.)

Q. How soon after the accident did you arrive at the scene?

A. I didn't go down for at least an hour.

Mr. Rosensweig: No further questions.

Mr. Focht: Just a moment. The court may have some questions.

The Court: Does the Gorge dip at the point where you say the plane was headed in that direction, after it disappeared from view, or do you know? A. You say does it dip?

The Court: Yes.

A. No; it does not dip, not right at that point, very much. It starts to go down.

The Court: How far could you see in that direction before it disappeared, before the plane disappeared? [64]

A. About three-quarters of a mile. You can see it just as it starts down that Gorge and, when it goes behind that hill, you can't see it.

The Court: How did you hear of the crash? You say somebody came along? A. Yes, sir.

The Court: And nothing was called to your attention in the way of any noise or anything of that kind? A. You couldn't hear it.

The Court: You couldn't hear the crash?

A. No.

The Court: You couldn't hear any electrical disturbance? A. No, sir.

The Court: That is all.

Mr. Rosensweig: Step down.

Mr. Foelt: May these witnesses be excused?

The Court: Yes.

Mr. Foelt: We again rest, your Honor. Before replying to counsel's motion for a dismissal, perhaps counsel wishes to add to it because there has been additional testimony.

Mr. Rosensweig: I don't believe, your Honor, that I have anything further to add to what I said yesterday.

### Arguments by Counsel

The Court: I could take this under submission but I have an impression, gained from the arguments and the briefs and the evidence, and they are all fresh in my mind. I have in mind the general rule of law that it is incumbent upon you to prove your case by a preponderance of the evidence. You are suing for negligence on the part of the operator of this plane. You must prove your case in this instance as in the general run of cases. You have only an inference based on the fact that he was traveling at the altitude to which the witnesses have testified. I am not sure that it is a violation of the rules, assuming the fact to be true that he was traveling at that low altitude. We have come to the point now where I would have to do a lot of guessing if I would conclude it was negligence on his part to travel at that height. We get to the point now where the plane disappears from view, out of sight, of all of the witnesses.

Undoubtedly, the plane came in contact with the power lines. How that happened nobody knows. If he was flying at a low altitude, in contravention of the Civil Aeronautics rule, before he disappeared from view—I can't say at that time, at the time of the accident, that he was flying at that low altitude. There is nothing in the evidence to that effect. I don't know that I can carry any such inference to the extent that you argue I should carry it. He might just as well have been up a thousand or two thousand feet at that point. There is evidence here that he did fly, in his flight, back and forth over these hills but that, of course, has nothing [66] to do with this particular moment. I am not so sure but what one witness stated that he went over this hill and another witness stated he went around it, before he disappeared from view. I will look at my notes here. The witness Kenneth Tinkham stated that, when he went up, going up the river area there, his plane was raised over the hill and then he went up in a northerly direction, at the point that he marked "X-2," the point where the plane changed course and went north and out of sight. Whether he intended to convey the meaning that he went over this hill on the way back or not I don't know, but he said he followed the same course. So, if he did, before he disappeared from view, he must have gone over the hill.

Mr. Focht: I believe, your Honor, he was referring to the hill to the north, where he made his turn.

The Court: He said on the return trip he returned on the same route. We are still speculating as to what happened at the time of the accident and I don't think that I can carry the inference that you suggest. In other words, I think it is your function to show negligence at the time when he disappeared from view. Nobody saw the accident. And, in view of my notion that I am not so sure that he was violating this rule in flying at that altitude, in that uninhabited area, I am going to sustain the motion of the defendant in this case. Will you prepare the order? [67]

Mr. Rosensweig: Yes, your Honor; I will prepare the order as soon as I get back to Los Angeles and submit it to counsel as to form and substance.

The Court: We will stand adjourned. [68]

#### Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of February, A. D., 1948.

/s/ ROSS REYNOLDS,  
Official Reporter.

[Endorsed]: No. 11905. United States Circuit Court of Appeals for the Ninth Circuit. San Diego Gas & Electric Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

Filed April 22, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11905

SAN DIEGO GAS & ELECTRIC COMPANY, a  
corporation, Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD FOR PRINTING

Comes now the appellant in the above entitled cause and hereby adopts as its statement of points on which it intends to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.



Appellant hereby designates for printing the entire certified transcript of the record save and except that portion thereof which contains Plaintiff's Exhibits 1 and 2.

Dated this 27th day of April, 1948.

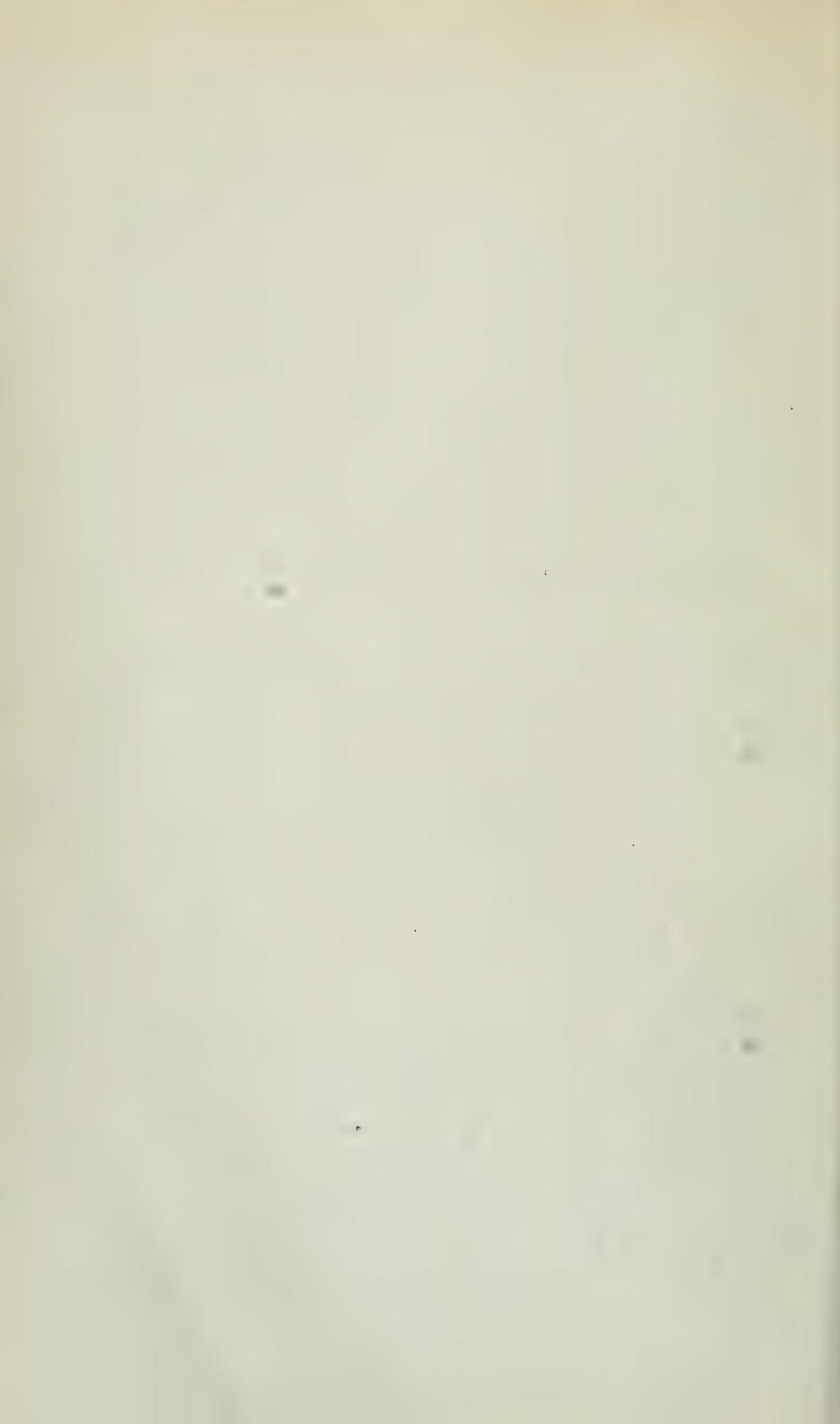
LUCE, FORWARD, LEE &  
KUNZEL,

By /s/ JAMES L. FOCHT, JR.

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 29, 1948.



No. 11905.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,  
*Appellant,*

*vs.*

UNITED STATES OF AMERICA,  
*Appellee.*

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**APPELLANT'S BRIEF**

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LUCE, FORWARD, LEE & KUNZEL,  
1220 San Diego Trust & Savings Building,  
San Diego, California,

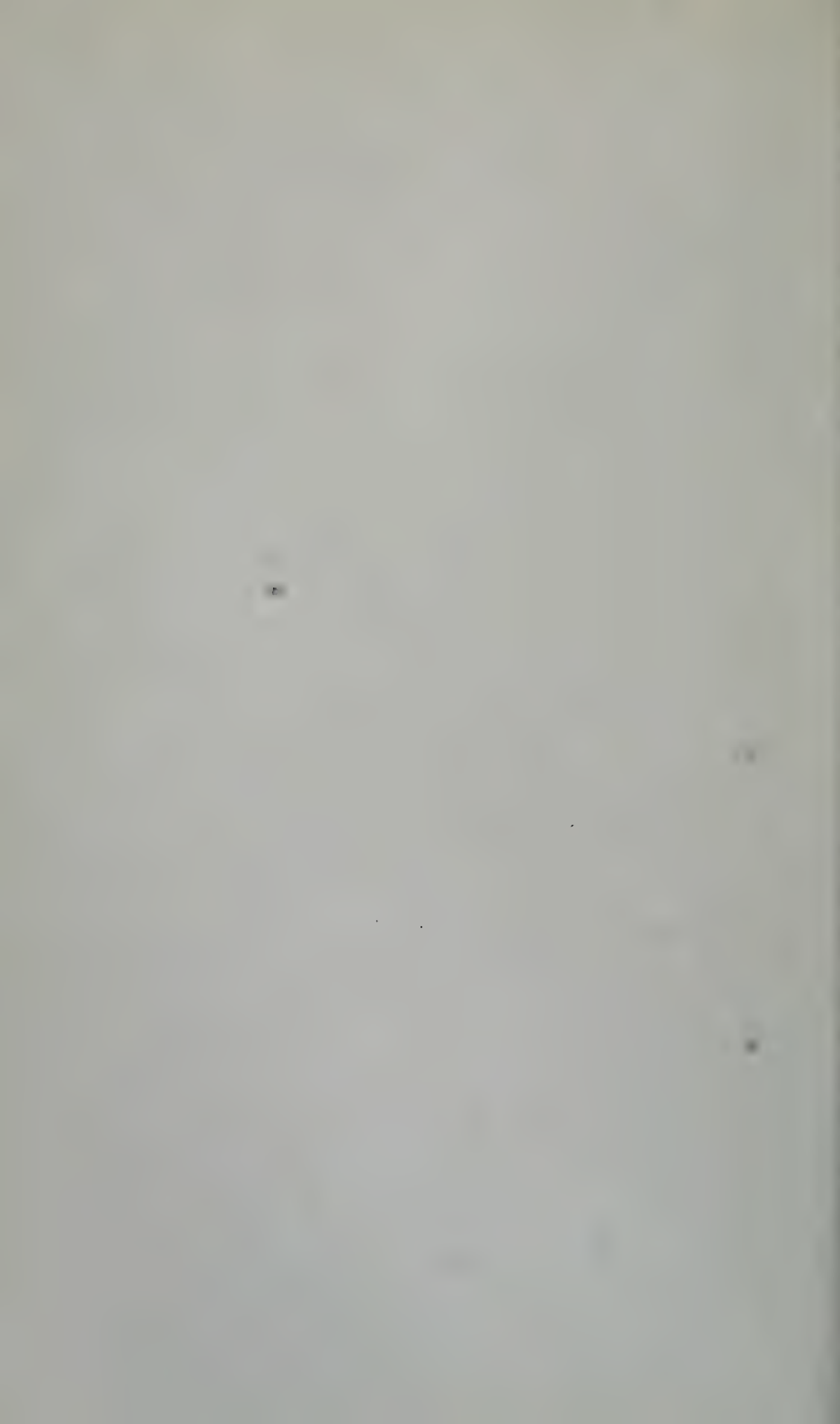
*Attorneys for Appellant, San Diego Gas & Electric  
Company, a corporation.*

FILED

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JUN 28 1948

PAUL P. O'BRIEN,



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No. 11905.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,  
*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANT'S BRIEF**

---

**Jurisdiction.**

In compliance with Rule 20 (C. C. A. 9, Subsection 2b) appellant states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

*United States Code Annotated, Title 28, Section 931: SUITS ON TORT CLAIMS AGAINST THE UNITED STATES:*

“Jurisdiction; liability of United States; . . .

(a) Subject to the provisions of this chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or

omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages; . . . ”

*United States Code Annotated, Title 28, Section 941 (c):* DEFINITIONS.

“ ‘Acting within the scope of his office or employment,’ in the case of a member of the military or naval forces of the United States, means acting in the line of duty. . . . ”

*United States Code Annotated, Title 28, Section 933:* REVIEW.

“(a) Final judgments in the district courts in cases under this subchapter shall be subject to review by appeal . . .

1. in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; . . . ”

*United States Code Annotated, Title 28, Section 225 (Judicial Code, Sec. 128): APPELLATE JURISDICTION:*

“(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—*First:* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.”

It appears from the plaintiff's complaint [R. pp. 2, 3, 4], that it is based upon a claim against the United States for money only on account of damage to plaintiff's property caused by the alleged negligent acts of a non-commissioned officer in the United States Coast Guard acting in line of duty. Said damage is alleged to have occurred on or about September 5, 1945, in San Diego County, California.

### Statement of the Case.

The plaintiff and appellant appeals from the judgment of dismissal rendered against it pursuant to the motion of the defendant and appellee at the conclusion of the presentation of the plaintiff's evidence.

This is an action under the "Federal Tort Claims Act." Appellant, a public utility company, maintained certain transmission lines across Mission Gorge in San Diego County, California, together with the supporting towers. The wire cables ranged in height from 187 feet to 210 feet above the floor of the Gorge. The above equipment was damaged when a United States Coast Guard airplane collided with the wires on September 5, 1945. The accident occurred in midafternoon and the day was clear.

At the time of the accident the Coast Guard plane was being operated by Glen O. Ferrin, a non-commissioned officer in the United States Coast Guard, who was then acting in the line of duty. The plane had been dispatched from a Coast Guard Air Station on San Diego Bay and was on a routine training flight at the time of the accident.

Shortly prior to the accident the plane was observed in flight by the three witnesses who testified for the plaintiff. The witnesses were then at Tinkham Center, an establishment on the edge of Mission Valley, which runs in a general east and west direction. Tinkham Center is approximately one-half to three-quarters of a mile to the east of the point where the power line crosses Mission Gorge. Mission Valley narrows



into Mission Gorge at about the point, or slightly east of the point, where the power line crosses the Gorge.

The witnesses first saw the plane as it flew up the valley in an easterly direction, at an altitude of approximately 200 to 235 feet. It passed in front of Tinkham Center and then turned left, or north, disappearing from sight as it went up a canyon behind a hill. About five minutes later the plane returned in approximately the same course and started down the valley in a westerly direction, still at an altitude of from 200 to 235 feet. The plane entered Mission Gorge and passed from the view of the witnesses. The course of the plane may be clarified by reference to plaintiff's Exhibits No. 1, No. 2 and No. 3. Approximately a minute thereafter the witnesses were advised by a motorist that the accident had occurred and two of the witnesses departed for the scene thereof, arriving within five minutes. They observed the wrecked plane from 300 to 500 feet south of the damaged wires. The motor of the plane sounded normal at all times and there was no indication prior to the accident that the plane was in distress.

The reasonable cost of the repairs to appellant's transmission lines and supporting equipment necessitated by the accident was \$2,166.89.

The only issue submitted for the decision of the District Court was whether the collision with appellant's transmission lines was proximately caused by the negligence of the pilot of the plane, and the Court in granting the motion for dismissal adjudged that ap-

pellant had failed to establish such negligence by a preponderance of the evidence. Appellant contends that such negligence was established and that it was error to dismiss the action.

No findings of fact or conclusions of law were made by the District Court.

### Specifications of Error.

Appellant respectfully submits that the Honorable District Court erred:

1. In granting appellee's motion for a dismissal of the above action.
2. In failing to give appellant the benefit of the reasonable inferences to which it was entitled under the evidence.
3. In holding that it was not established by the preponderance of evidence that the damage in question was proximately caused by the negligence of appellee's pilot.
4. In not applying the doctrine of *res ipsa loquitur*.

### Summary of Argument.

POINT I: In granting appellee's motion to dismiss, the Honorable District Court failed to give appellant the benefit of the reasonable inferences to which it was entitled.

POINT II: The preponderance of the evidence established that the accident was due to the negligent operation of appellee's airplane.

POINT III: The doctrine of *res ipsa loquitur* is applicable to this case.

## ARGUMENT

### POINT I.

#### **Appellant Is Entitled to the Benefit of All Reasonable Inferences.**

In granting appellee's motion to dismiss, the Honorable District Court failed to give appellant the benefit of the reasonable inferences to which it was entitled. This is apparent from the statements of the Court that appear in the record, such as:

"Suppose the plane had dropped on this power line. Suppose it was up 1,000 feet and had dropped. Nobody seems to have followed the airplane to where the accident occurred." [R. p. 55.]

" . . . Can I assume from the evidence that the plane was flying low at this particular point; that it was flying low at the point where the impact was?"

MR. FOCHT: Certainly, your Honor, it is the more reasonable inference to draw than any other inference that can be drawn.

THE COURT: It is up to you to prove your case not by inferences but by facts." [R. pp. 56, 57.]

" . . . Undoubtedly, the plane came in contact with the power lines. How that happened nobody knows. If he was flying at a low altitude, in contravention of the Civil Aeronautics rule, before he disappeared from view—I can't say at that time, at the time of the accident, that he was flying at that low altitude. There is nothing in the evidence to that effect. I don't know that I can carry any such inference to the extent that you



argue I should carry it. He might just as well have been up a thousand or two thousand feet at that point." [R. p. 78.]

In effect by its ruling the Court declared that in such a case no plaintiff could prevail unless he produces an eye witness who followed the course of the plane to the very point of impact.

The general rule is stated in *32 Corpus Juris Secundum*, Evidence, Sec. 1044, p. 1129:

"A verdict or finding may be based on reasonable inferences fairly drawn from the facts in evidence and a material fact need not be proved by direct evidence; it is sufficient if there is evidence from which the fact can properly be inferred. The triers of fact may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them; indeed, it is their duty to make, and give consideration to all inferences and deductions which may properly be drawn. A reasonable inference is as truly evidence as the matter on which it is based. . . . "

Numerous authorities are cited in the above text in the support of this fundamental rule.

Courts have frequently declared that so-called "circumstantial evidence" may outweigh direct or eye-witness testimony.

*Adams v. Johnson*, 107 U. S. 251, 27 L. Ed. 386,  
2 S. Ct. 246;

*The Struggle v. United States*, 9 Cranch (U. S.)  
71, 3 L. Ed. 660;

*Olberg v. Kroehler*, 8 Cir., 1 F.( 2d) 140;  
*Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419;  
 20 Am. Jur., Evidence, Sec. 1189, p. 1041.

The following quotation from the opinion of the District Court in the case of *Kelley Island Lime & Transport Co. v. City of Cleveland*, 47 F. Supp. 533, 540, is particularly applicable to the case at bar:

“The law never intended to impose such hardships on parties injured as to deprive them of a right to recover if eyewitnesses cannot be produced to show how the obstruction was created. *Rules of reason and sound common sense dictate that the law’s demands may be satisfied in the absence of eyewitness testimony by proof of facts from which but one reasonable inference can be drawn.* (Italics supplied.)

The only reasonable inference that can be drawn from the facts established by the evidence in the present case is that the appellee’s airplane continued to be flown at an altitude of from 200 to 235 feet above the terrain after passing out of the sight of appellant’s witnesses and until it struck the wires. After the plane passed from the vision of the witnesses R. H. Tinkham and Kenneth R. Tinkham, they continued to look in the direction of Mission Gorge, watching for the plane to come out of the gorge. [R. pp. 58, 59, 75.] The distance from the point where the airplane passed out of the vision of the witnesses to the power line was estimated at from 300 to 600 feet. [R. pp. 66, 75.] Within one or two minutes after the plane passed out

of the sight of the witnesses, the witness R. H. Tinkham was notified that the plane had crashed [R. p. 60], and he and the witness Frank Darnell arrived at the scene of the crash within five minutes. [R. p. 67.] Also significant is the fact that the plane came to rest from 300 to 500 feet past the power line in the direction the plane had been traveling. [R. p. 37.] Such evidence is not consistent with an inference that the plane might have dropped on the power line from a higher altitude.

It is submitted that only one inference may reasonably be drawn from the above facts. That inference is that the plane struck the power line immediately after passing from the sight of the witnesses, while traveling at an altitude of approximately 200 feet. Any inference that the plane after passing from view climbed to a higher altitude and fell upon the wires because of motor failure or other reasons is not reasonable and must be rejected.

While the District Court made no formal findings of fact it is apparent from the record that it refused to find that the airplane in question maintained its low altitude until the impact with the wires. On the contrary, it took the position that it was an equally probable inference that the plane, after its disappearance, climbed to an altitude of 1,000 or 2,000 feet and then dropped on the wires. From the undisputed evidence, such an occurrence was not only improbable but impossible.

The present case is analogous to the case of *Mateas v. Fred Harvey*, 9 Cir., 146 F. (2d) 989. In that case

as in this, the trial court granted the defendant's motion to dismiss made at the conclusion of the presentation of the plaintiff's evidence, but no findings of fact or conclusions of law were made. This Court reviewed the comments of the District Court wherein it remarked that the record showed no basis for liability, stating (at page 993):

“ . . . This judicial comment is in effect a finding that the evidence adduced, taken at its face value, cannot support an inference either of negligence or of a violation of warranty. The last and concluding thought in the comment is ‘ . . . the record shows no basis for liability.’ This ruling, as would be a formal finding to the same effect, is clearly erroneous.”

The judgment of the District Court was reversed.

It is submitted that the ruling of the Honorable District Court embraced in its comments wherein it denied the plaintiff the benefit of legitimate and reasonable inferences is clearly erroneous.

## POINT II.

**It Was Established by a Preponderance of the Evidence  
That the Accident Was Due to the Negligent Operation  
of Appellee's Airplane.**

Section 60.105 of the Civil Air Regulations of the Civil Aeronautics Board of the Department of Commerce enacted pursuant to the authority contained in 49 U. S. Code Annotated, Sec. 551, and in effect at the time of the accident in question provided as follows:

*“Minimum safe altitudes.* Except when necessary for taking off and landing, aircraft shall be flown:

(a) when over the congested areas of cities, towns, settlements, or open-air assemblies of persons, at altitudes sufficient to permit emergency landings outside such areas and in no case less than 1,000 feet above such areas, and

(b) when elsewhere than as specified in paragraph (a), at an altitude of not less than 500 feet, except over water or areas where flying at a lower altitude will not involve hazard to persons or property on the surface.”

At the trial of this case it was stipulated that the above regulation was applicable to Coast Guard pilots and that they were bound thereby to the same extent as civilian pilots. [R. pp. 22, 23.]

Such a departmental regulation has the force and effect of law if it is not in conflict with express statutory provision.



*Maryland Casualty Co. v. United States*, 251 U. S. 342, 349; 40 S. Ct. 155, 157; 64 L. Ed. 297;  
*W. A. Hover & Co. v. Denver R. G. W. R. Co.*,  
 8 Cir., 17 F. (2d) 881, 884.

The violation of such a departmental regulation imposing a duty for the protection of others is negligence.

*W. A. Hover & Co. v. Denver R. G. W. R. Co.*,  
 8 Cir., 17 F. (2d) 881, 884.

It is submitted that the evidence conclusively establishes that appellee's airplane was negligently operated as a matter of law by virtue of the violation of the above regulation by the pilot. It can not fairly be urged that the flight was "in an area where flying at a lower altitude will not involve hazard to persons or property on the surface." The line of flight leading up to the accident bordered on a traveled highway and the scene of the accident was adjacent to the city limits of San Diego. Flight at a height of approximately 200 feet must have constituted a hazard to the property involved, wires from 187 feet to 210 feet in height, and their supporting towers.

Aside from the Civil Air Regulations, the evidence of negligence is overwhelming. At all times while the plane was within the sight and hearing of the witnesses its engines sounded normal and it appeared to be in no distress. No reasonable interpretation can be placed upon the manner of flight but that it was voluntary. To intentionally fly at this low height, to enter a canyon or gorge and to collide with the power line equipment in broad daylight is consistent only with a finding

of negligence. The field of aviation is not so new or novel that it may be denied that certain recognized standards of conduct exist. The hazards incident to low flying are self evident.

Where the evidentiary facts are not in conflict or dispute the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action.

*Home Indemnity Co. of New York v. Standard Accident Insurance Co.*, 9 Cir., No. 11661, (decided May 11, 1948) ;

*Kuhn v. Princess Lida*, 3 Cir., 119 F. (2d) 704.

It is submitted that the only conclusion which reasonably follows from the evidence in this case is that the accident was caused by the negligent operation of appellee's airplane.

### POINT III.

#### **The Doctrine of Res Ipsa Loquitur Is Applicable.**

While there has been some diversity of opinion expressed by appellate courts throughout the United States as to whether the doctrine of *res ipsa loquitur* applies to aviation accident cases, it is the rule in this State established by the California Supreme Court that the doctrine does so apply.

In the case of *Smith v. O'Donnell*, 215 Cal. 714, 12 Pac. (2d) 933, it was held that the doctrine was applicable to a case arising out of a midair collision of two airplanes. The basis of the doctrine is stated in the opinion of that case, as follows, (at p. 722):

“The foundation or reason for the doctrine is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can the most conveniently prove it raises a presumption of negligence which the defendant must overcome by proof that there was in fact no negligence.”

In *Smith v. Pacific Alaska Airways, Inc.*, 9 Cir., 89 F. (2d) 253, cert. den. 302 U. S. 700, 58 S. Ct. 20, 82 L. Ed. 541, the applicability of the doctrine of *res ipsa loquitur* to aviation accident cases was accepted

by this Court. In that case the administrator of an airplane passenger who was killed by the crash of an airplane belonging to the defendant brought suit to recover damages for his death. The plaintiff proved the plane crash and rested, relying upon the doctrine of *res ipsa loquitur*. The defendant introduced evidence to meet the *prima facie* case arising under the doctrine and the jury returned a verdict for the defendant. The Circuit Court of Appeals, in reversing the judgment for the defendant because of the receipt of certain incompetent evidence, did not question the applicability of the doctrine.

In *Smith v. O'Donnell*, *supra*, in applying the rule of *res ipsa loquitur*, the California Supreme Court said (at page 723):

“ . . . If the proper degree of care is used a collision in midair does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury.”

It is submitted that such comment applies with stronger reason to the facts of the case at bar. Surely if the proper degree of care is used a collision between an airplane and a stationary ground object does not ordinarily occur, particularly in broad daylight when no mechanical difficulty or unusual weather condition is indicated.

The facts of the present case are similar to those in the case of *Sollak v. State of N. Y.*, 1929 U. S. Av. R. 42, (N. Y. Ct. Cl. 1927), one of the first applications of the doctrine of *res ipsa loquitur* to a case involving a

claim for damages caused by an airplane crash. In that case the automobile in which the claimant was riding was stopped on a public highway adjacent to an airport. An airplane piloted by a state officer struck the automobile, causing the injuries complained of. The claimant relied upon the doctrine of *res ipsa loquitur*, and the defendant offered no explanation as to how the collision occurred. While the New York Court of Claims did not specifically mention the doctrine, it expressly applied the principles of *res ipsa loquitur* in its opinion, stating as its conclusion of law that the accident occurred through the fault and negligence of the airplane pilot.

In *Seaman v. Curtiss Flying Service*, 247 N. Y. S. 251, the facts are stated in the opinion as follows, (at page 252) :

“This is an action for damages for death caused by the crash of an airplane in which deceased was a passenger. On the day of the accident the weather was clear, and the wind was blowing not over 15 miles an hour from northwest. The accident occurred at Curtiss Field, Long Island, and just before crashing the plane was seen to turn and dip its right wing. Plaintiff’s theory was that the cause of the crash was the negligent act of an over-confident pilot making a sharp turn at too steep a bank at a low altitude, at a place where it was reasonably to be expected that upward currents of air might tip the wing of his plane, thereby exposing its passenger to danger.”



The New York Supreme Court in reversing a judgment in favor of the defendant stated (at page 253):

“The charge was likewise prejudicial in its failure to charge the doctrine of *res ipsa loquitur*, which had, under the facts appearing in this record, application to this case as a rule of evidence to aid the jury in passing upon the issue of liability.”

In *Kadylak v. O'Brien*, 1941 U. S. App. 8, (U. S. D. C. W. D. Pa. 1941), a rudder control cable broke, necessitating a forced landing which resulted in the death of a small boy on the ground. The Federal District Court held that the burden was upon the owner of the airplane to establish freedom from fault, saying:

“The present case is of that class in which the instrumentality that produced the injury was under the control and management of the defendants, and the accident was such as does not happen if due care has been used.”

In *English v. Miller*, 43 S. W. (2d) 642 (Texas Civ. Appeals), the airplane crash resulting in the litigation occurred when the pilot of the aircraft was engaged in acrobatics at a low altitude. The opinion states that the doctrine of *res ipsa loquitur* would have been applicable but for the fact that the plaintiff had pleaded specific acts of negligence which under Texas procedure precluded reliance upon the doctrine.

A number of decisions from other jurisdictions have declined to apply the doctrine of *res ipsa loquitur* to cases arising out of airplane crashes, upon the theory that aviation has not yet reached such a stage of de-

velopment that it can be said that the accident in question would not ordinarily occur without negligence. This contention is aptly answered by the opinion in an English case decided in 1936. In the case of *Fosbroke-Hobbs v. Airwork, Ltd.*, 56 Ll. L. R. 209, 53 T. L. R. 254, 81 Sol. J. 80, 1938 U. S. Av. R. 194 (K. B. England 1936), the Court said in this regard:

“It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails and passengers all over the world, and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet the courts found no difficulty in applying to them by the year 1844 the same doctrine that had formerly been applied to stage coaches.”

In any event, the type of accident involved in the case at bar, a collision between a low-flying airplane and a stationary object in broad daylight, is one where reasonable men should be able to say that the balance of probabilities is in favor of negligence and hence *res ipsa loquitur* is applicable. (See Prosser On Torts (1941 ed.), Sec. 43, p. 292.)

While the doctrine of *res ipsa loquitur* has most frequently been applied to cases where the passenger-carrier relationship existed, the generally accepted view and that adopted in California extends the doctrine to all cases where the facts meet the fundamental principles of the rule, irrespective of any contractual relationship between the parties.

*Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020; 29 L. R. A. 718, 48 Am. St. Rep. 146;  
*Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.

In the *Judson* case, the California Supreme Court quoted with approval the following language from the opinion in *Rose v. Stephens, Etc. Co.*, 11 F. 438:

“Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties.”

That the application of the doctrine in California is in no way dependent upon a passenger-carrier or a contractual relationship is further illustrated by cases where the doctrine has been applied to a collision between the defendant's moving vehicle and the plaintiff's parked vehicle, a type of case analogous to the case at bar.

*Slappery v. Schiller*, 116 Cal. App. 274, 2 Pac. (2d) 577;

*Bauhofer v. Crawford*, 16 Cal. App. 676, 117 Pac. 931.

It is submitted that a Federal Court sitting in California is bound by the California rule that the doctrine of *res ipsa loquitur* is applicable to aviation accident cases and the further rule that the application of the doctrine is not dependent upon the existence of a carrier-passenger or contractual relationship. The Federal Tort Claims Act (28 U. S. C. A., Sec. 931) provides that the government shall be liable under circumstances where the United States if a private person would be liable in accordance with the law of the place where the act or omission occurred. Since the decision in the case of *Eric R. C. v. Tompkins*, 304 U. S. 64, 82 L. Ed., 1188, 58 S. Ct. 817, 114 A. L. R. 1487, the Federal Courts have held that questions of presumptions and burden of proof are questions of substantive law, controlled by state precedents, and have regarded themselves bound under that decision by state precedents on such questions.

*Cities Serv. Oil Co. v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201;

*Sampson v. Channell*, 1 Cir., 110 F. (2d) 754, 128 A. L. R. 394 cert. den. 310 U. S. 650, 84 L. Ed. 1415, 60 S. Ct. 1099;

*Hagan & Cush Co. v. Washington Water Power Co.*, 9 Cir., 99 F. (2d) 614;

54 *Amer. Jur.*, United States Courts, Sec. 358, p. 982;

*Anno*. 128 A. L. R. 405.



In *Hagan & Cush Co. v. Washington Water Power Co.*, *supra*, this Honorable Court held that the state decisions on *res ipsa loquitur* were binding upon the Federal Court and in particular that the state ruling as to the effect of the inference of negligence governed. In California the inference of negligence which is created by the application of the doctrine of *res ipsa loquitur* may not be disregarded by the trier of the facts and creates a *prima facie* case which necessitates a judgment in favor of the plaintiff in the absence of evidence rebutting the inference.

*Michener v. Hutton*, 203 Cal. 604, 265 Pac. 238, 59 A. L. R. 480;

*Manuel v. Pac. Gas & Elec. Co.*, 134 Cal. App. 512, 25 Pac. (2d) 509;

19 Cal. Jur., Negligence, Sec. 132, p. 717.

In *Michener v. Hutton*, *supra*, the California Supreme Court said (at page 609):

“One who seeks to recover damages for injuries alleged to have been incurred by reason of another’s negligence must establish by a preponderance of the evidence that the latter’s negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of *res ipsa loquitur*, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff’s *prima facie* case.”



### Conclusion.

It is respectfully submitted that the decision and judgment of the Honorable District Court dismissing the present action is against the clear weight of the evidence. The District Court, in refusing to find that the airplane in question maintained its low altitude from the time it left the sight of the witnesses until it collided with the power lines, deprived appellant of the benefit of the reasonable inferences to be drawn from the proven facts. The only conclusion that can be drawn from the undisputed facts is that the damage in question proximately resulted from the negligence of appellee's pilot. The pilot was negligent as a matter of law in flying at an altitude less than that prescribed by the Civil Air Regulations. Irrespective of the regulations, the facts are consistent only with a finding of negligence, the pilot having guided his plane into Mission Gorge at a low altitude and collided with a stationary ground object in broad daylight. The doctrine of *res ipsa loquitur* is applicable to the present case. The Supreme Court of California has ruled that the doctrine is applicable to airplane accident cases, and in California the doctrine raises an inference that, unless rebutted, requires a judgment for the plaintiff. The Federal Courts sitting in California are bound by these California precedents. Aside from California precedents, the doctrine of *res ipsa loquitur*, by its very nature, is applicable to the case at bar.

It is respectfully submitted that upon the record presented and the points and authorities cited above that the judgment should be reversed.

Respectfully submitted,

*Charles H. Forward*

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No. 11905

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,  
*Appellant,*

*vs.*

UNITED STATES OF AMERICA,  
*Appellee.*

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## APPELLEE'S BRIEF.

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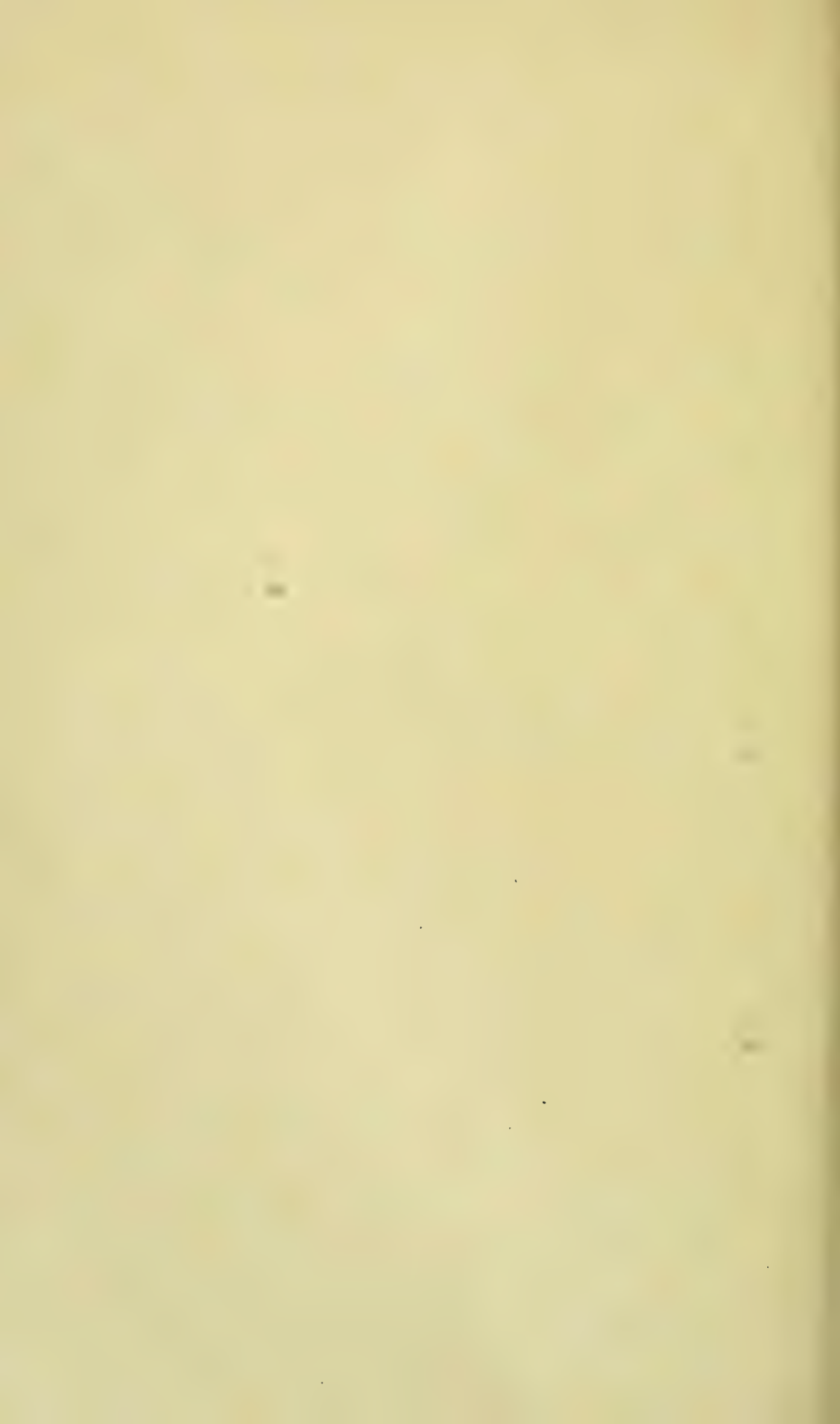
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## APPELLEE'S BRIEF.

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### Statement of Jurisdiction.

Appellant brought an action against the United States under authority of United States Code, Title 28, Section 931. That Section confers jurisdiction upon the District Court to try the case. United States Code, Title 28, Section 225 and Section 933 vests jurisdiction in this Court to determine the appeal.

### Statement of the Case.

On February 18, 1947, Appellant filed a Complaint for Damages in the District Court. The Complaint was filed pursuant to the provisions of the "Federal Tort Claims Act." After alleging the corporate character of the plaintiff and the ownership by the plaintiff of certain trans-

mission lines for the transmission of electricity, the Complaint alleges:

“That on or about the 5th day of September, 1945, Glen D. Ferrin was a non-commissioned officer in the United States Coast Guard, to wit, a Chief Aviation Pilot, and that he was on said date attached to the United States Coast Guard Air Station at San Diego, California, and that on said date and while he was acting in line of duty operating and flying a certain airplane belonging to the defendant herein, the said Glen D. Ferrin piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with said plaintiff's transmission line crossing said Mission Gorge, thereby injuring, breaking and damaging said transmission line and the said supporting structures at either end of the same, including the equipment and installations used in connection therewith.”  
[R. 3.]

It was further alleged that plaintiff was required to expend the sum of \$2,166.89 for necessary repairs to said transmission lines and its supporting structures. On October 2, 1947, Appellee filed its Answer, wherein it admitted the ownership of the airplane described in the Complaint and its operation by the pilot named in the Complaint, at the time therein specified. The negligent operation of the airplane was denied. The case was called for pre-trial hearing on December 8, 1947. At that time it was stipulated that in the event the plaintiff was entitled to recover, it would be entitled to damages as prayed in the Complaint.

It was further stipulated that Section 60.105 of the Civil Air Regulations of the Civil Aeronautics Board of the Department of Commerce enacted pursuant to the

authority contained in United States Code, Title 49, Section 551, was applicable to Coast Guard pilots and that they were bound thereby. Insofar as applicable to this case, said regulation provided:

“\* \* \* Except when necessary for taking off and landing, aircraft shall be flown:

\* \* \* \* \*

“(b) \* \* \* at an altitude of not less than 500 feet, except over water or areas where flying at a lower altitude will not involve hazard to persons or property on the surface.”

It was further stipulated that plaintiff's transmission line which was involved in the accident included wires the lowest of which was 187 feet above the creek bed. The middle wire was 198 feet above the creek bed and the highest wire was 210 feet above the creek bed.

It was stipulated that the wires were strung upon towers one of which was located upon land owned by the City of San Diego and the other upon land leased by private individuals to Appellant and that the wires were strung between the two towers over land which was in the public domain. It was stipulated further that a proper franchise existed with respect to the towers and power lines.

Photographs which are before this Court in their original form, by virtue of a stipulation and order appearing at page 17 of the Record, were received in evidence at the pre-trial hearing by stipulation. These photographs were admitted for use of the witnesses in illustrating their testimony, and it was stipulated that they do not in themselves depict the height of the wires [R. 23-26]. At the request of plaintiff, the pre-trial was followed by immediate trial.

### The Facts.

The facts contended in Appellant's Statement of the Case are, in the opinion of Appellee, correctly stated with one exception and subject to one addition. Appellee, therefore, does not submit a complete Statement of Facts but does challenge the statement appearing on page 5, line 14, of Appellant's Brief to the effect that approximately a minute after the airplane involved in the accident entered Mission Gorge and passed from view of the witnesses, a motorist advised Appellant's witnesses that the accident had occurred. The testimony is not to that effect but rather witness, R. H. Tinkham, went to the scene of the accident not more than five minutes after the airplane went out of his sight [R. 45]. Appellant's Statement of the Case omits reference to the testimony of Appellant's witness, Kenneth R. Tinkham, to the effect that Gillespie Airport is an emergency landing located three miles from the point at which the accident occurred [R. 40].

### The Rule *Res Ipsa Loquitur* Does Not Apply to the Facts of This Case.

The principal rule sought to be invoked by Appellant is the doctrine of *res ipsa loquitur*; the second theory is that the evidence directly established the negligent operation of Appellee's airplane. The doctrine of *res ipsa loquitur* has been held not to apply to falling airplane cases.

In *Towle v. Phillips*, 172 S. W. 2d 806, the Supreme Court of Tennessee, in commenting upon earlier cases from other jurisdictions in which litigants had sought to



escape the necessity of proving actual negligence by virtue of the *res ipsa loquitur* rule, said:

“ ‘The decision of cases of that nature rests upon facts constituting a part of a wide spread fund of information.’ *Wilson v. Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N. E. 212, 214, 83 A. L. R. 329.

“Likewise in *Rochester Gas & E. Corp. v. Dunlop*, 148 Misc. 849, 266 N. Y. S. 469, the Court agreed that in the present state of aircraft development the doctrine of *res ipsa loquitur* could not be applied to the fall of an airplane when it was common knowledge that it fell from causes of which the pilot had no control.

“The Court of Appeals expressed similar views in *Boulineaux v. Knoxville*, 20 Tenn. App. 404, 99 S. W. (2d) 557.”

A like opinion has been expressed in 1935 by the Court of Appeals of Tennessee, Eastern Section, in

*Boulineaux v. Knoxville*, 99 S. W. 2d 557, at 560, where the following language occurs:

“In reply to the further issue, the court states that the trial court did not err in charging the jury that they must determine the act of negligence that proximately caused the injury. This is not a case for the application of the doctrine of *res ipsa loquitur*, for it is a common and not an unusual occurrence for airplanes to stall and fall while in operation, and without the intervention of negligence upon which they attributed the proximate cause of the injury. The court explained to the jury that it could not speculate or guess, but must determine the negligence cause. This is an elementary rule.”

A proper case for the application of the doctrine of *res ipsa loquitur* in aviation is to be found in

*Smith v. O'Donnell*, 12 P. 2d 933; 215 Cal. 714.

In that case, application of the doctrine was made but such application was conditioned upon three factors:

- (1) There was a collision between two planes;
- (2) There was injury to the person; and
- (3) There was the relationship of passenger and common carrier between the parties.

The Court in that case took pains to emphasize the reason for the application of the doctrine, devoting considerable space to demonstrating that the plaintiff was a passenger and that a common carrier is held to the highest degree of care. The California Court was, therefore, merely following the rule that has been long established that a *prima facie* case is made against the carrier when it is shown that a collision occurred in which a passenger was injured. Many cases have held that a presumptive negligence arises where a passenger on the car of a common carrier receives injury from the operation of the car. The rule in such cases rests upon the high degree of care required of a carrier toward its passengers and the defendant's greater ability to show the causes of the accident.

The within action is manifestly and clearly distinguishable from those cases which sought to apply the doctrine of *res ipsa loquitur*. The within case is one involving damage to property and not to the person. The United States is not a common carrier. The United States does not owe the highest degree of care with respect to wires maintained across the public domain by utility companies.

Further helpful analysis of the doctrine of *res ipsa loquitur* is found in

*Waller v. Southern Pacific Co.*, 37 Fed. Supp. 475  
(Dist. Ct. N. D. Calif.).

In that case the Court cited the following excerpt from

*Sweeney v. Erving*, 228 U. S. 233:

“In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant’s general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.”

See also,

*Smith v. Whitley*, 27 S. E. 2d 442,

wherein it was said:

“The doctrine of *res ipsa loquitur* does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot has absolutely no control, it being common knowledge that aeroplanes do fall without fault of the pilot.”

Appellant relies heavily upon

*Smith v. O'Donnell*, 215 Cal. 714.

It is true that the Court in that case applied the doctrine of *res ipsa loquitur* to an action involving a collision between two aircraft. The application of that decision to the facts of this case is inappropriate in that the California Supreme Court devoted most of its opinion to a determination that the operator of the airplane in that case was a common carrier. *Res ipsa loquitur* was applied because of the high degree of care required of a common carrier to those trusting themselves to it as paying passengers. Appellant in this case did not enjoy the same relationship to the United States that the passenger in the airplane enjoyed in the case of *Smith v. O'Donnell*.

### **Negligent Operation of Appellee's Airplane Was Not Established.**

Appellant argues that the mere act of operating an airplane at an altitude of 200 feet in the face of an appropriate Department of Commerce regulation requiring operation at 500 feet is negligence. It is argued that the observation of Appellee's aircraft in traveling approximately one mile from the place of the accident establishes that it continued in flight at about the same altitude until it struck the power line of Appellant which was strung at an altitude of 210 feet above the floor of the gorge. It is submitted that an airplane traveling in open and sparsely settled country is not bound under the regulation relied upon by Appellant to travel at an altitude of 500 feet. Furthermore, it is presumed that, if it were required by law to travel at that height, it did so. The old common law presumption to this effect is

statutory law in California. Section 1963 of the Code of Civil Procedure, in enumerating the disputable presumptions, includes as Number 33 "that the law has been obeyed."

None of the witnesses at the trial testified to seeing the collision of the plane with the wires, and Appellee is, therefore, aided by a presumption that at the point of impact with the wires the plane had gained altitude so that it was being operated in compliance with the regulation. When counsel for Appellant argued that the plane had barely withdrawn from sight of the witnesses at the time of the collision and, therefore, might well have been presumed to have continued traveling at the low altitude, the Trial Court was apparently moved more by the presumption of regularity than by the argument of counsel, for the District Judge said, at page 55 of the Record:

"The Court: Suppose the plane had dropped on this power line. Suppose it was up 1,000 feet and had dropped. Nobody seems to have followed the airplane to where the accident occurred."

At page 56 the Court further commented:

"The Court: There is no question but what the plane hit the power line. But how high was the plane above the power line? No one is being tried for a violation of an ordinance or the aeronautics rules.

\* \* \* \* \*

"The Court: Assuming that the plane was flying 200 or 235 or 335 feet from where these witnesses saw the plane, they all said that the plane came back and then disappeared and then, a few minutes later,



they heard about this crash; that somebody told them about it. They didn't even hear the crash. No one has told us how high the plane was flying at the time of this crash. It might have flown a few feet or might have flown a hundred feet above where the crash occurred. Can I assume from the evidence that the plane was flying low at this particular point; that it was flying low at the point where the impact was?"

Counsel for Appellant then suggested that the reasonable inference for the Court to draw was that the plane had continued at its low altitude. The Court replied:

"It is up to you to prove your case not by inference but by facts." [R. 57.]

The evidence was thereupon reopened. Despite the taking of additional evidence, Appellant was unable to establish by the testimony of any witness that the plane was observed after it moved out of sight beyond the hill. The Trial Judge took the view that it had not been established that flying at the low altitude had been continued to the point of impact. The Court made the following remarks:

"I have in mind the general rule of law that it is incumbent upon you to prove your case by a preponderance of the evidence. You are suing for negligence on the part of the operator of this plane. You must prove your case in this instance as in the general run of cases. You have only an inference based on the fact that he was traveling at the altitude to which the witnesses have testified. I am not sure that it is a violation of the rules, assuming the fact

to be true that he was traveling at that low altitude. We have come to the point now where I would have to do a lot of guessing if I would conclude it was negligence on his part to travel at that height. We get to the point now where the plane disappears from view, out of sight, of all the witnesses." [R. 77.]

"Undoubtedly, the plane came in contact with the power lines. How that happened nobody knows. If he was flying at a low altitude, in contravention of the Civil Aeronautics rule, before he disappeared from view—I can't say at that time, at the time of the accident, that he was flying at that low altitude. There is nothing in the evidence to that effect. I don't know that I can carry any such inference to the extent that you argue I should carry it." [R. 78.]

\* \* \* \* \*

"We are still speculating as to what happened at the time of the accident and I don't think that I can carry the inference that you suggest. In other words, I think it is your function to show negligence at the time when he disappeared from view. Nobody saw the accident. And, in view of my notion that I am not so sure that he was violating this rule in flying at that altitude, in that uninhabited area, I am going to sustain the motion of the defendant in this case." [R. 79.]

The language of the Judge of the District Court establishes that he found the facts against the Appellant and the finding is binding upon this Court.

**Conclusion.**

It is respectfully submitted that the decision and judgment of the District Court in dismissing the present action is supported by the law and that the judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,  
*United States Attorney;*

ERNEST A. TOLIN,  
*Chief Assistant United  
States Attorney,  
Attorneys for Appellee.*

No. 11905

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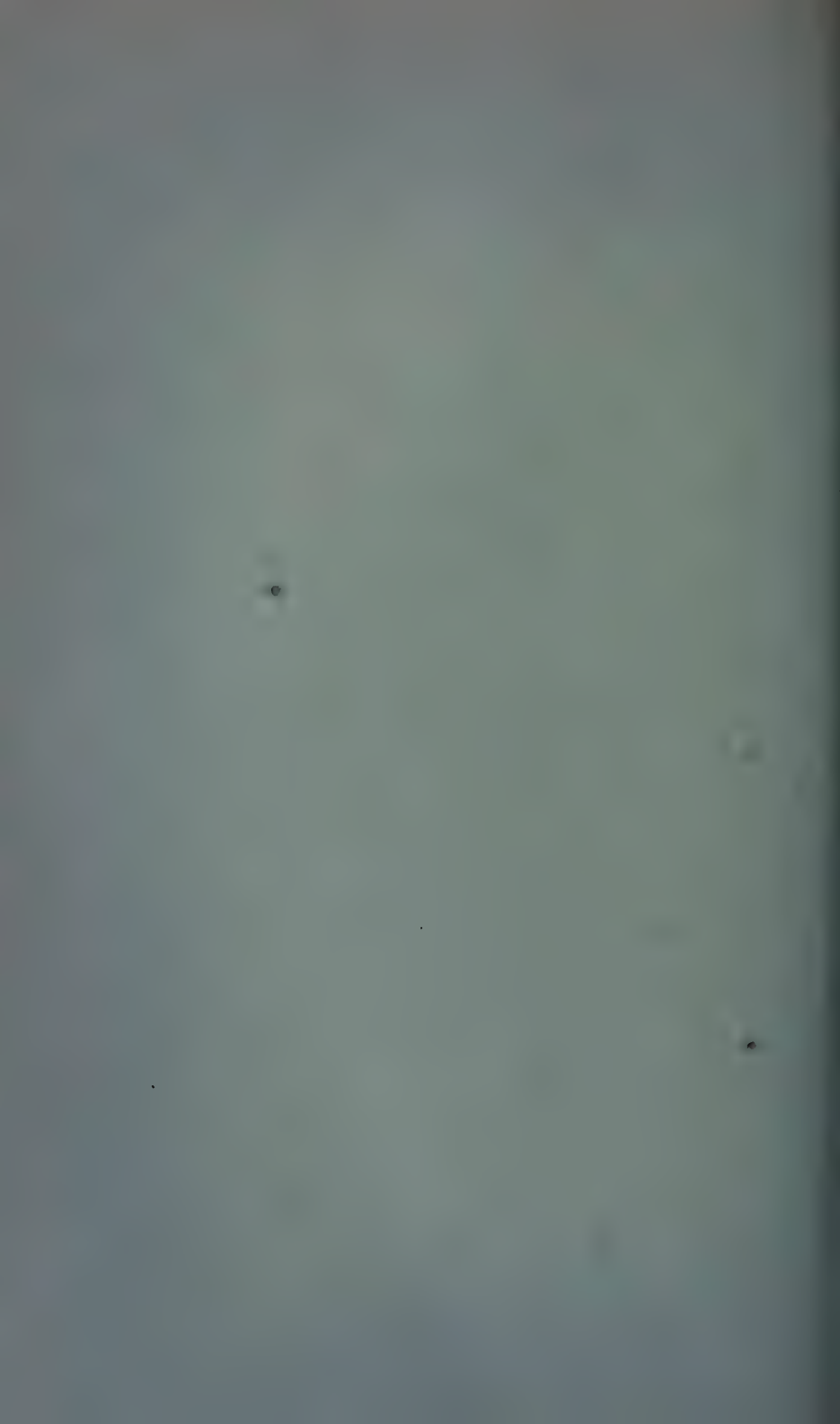
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Appellant's Reply Brief

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Appellant's Reply Brief

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REPLY TO APPELLEE'S STATEMENT OF FACTS

Appellee concedes that Appellant's Statement of the Case is correct, except for Appellant's interpretation of the testimony of R. E. Tinkham as to when the witnesses received advice that the accident had occurred. (See Appellee's Brief, p. 4.) This witness testified as follows:

“Q. How long after the plane went out of sight was it that you went down there?

A. I think I was there five minutes at least after it fell; not any more than five minutes. (R., p. 45.)

This testimony obviously refers to the time he arrived at the scene of the accident. Mr. Tinkham's testimony that he was advised of the crash one or two minutes after the plane disappeared into Mission Gorge (R., p. 60), is undisputed.

Appellee states on page 8 of its brief:

“It is argued that the observation of Appellee's aircraft in traveling approximately one mile from the place of the accident establishes that it continued in flight at about the same altitude until it struck the power line of Appellant which was strung at an altitude of 210 feet above the floor of the gorge.”

The scene of the accident was variously estimated by Appellant's witnesses to be from 300 to 600 feet from the point at which the airplane disappeared, not a mile. (R., pp. 66, 74, 75.)

## REPLY TO APPELLEE'S CONTENTION THAT THE RULE OF RES IPSA LOQUITUR DOES NOT APPLY TO THE FACTS OF THIS CASE.

In discussing the opinion of the California Supreme Court in the case of *Smith v. O'Donnell*, 215 Cal. 714, 12 Pac. (2d) 933, Appellee dwells upon the fact that a passenger-carrier relationship existed in that case. However, the opinion in the Smith case does not evidence any intention on the part of the California Supreme Court to limit the application of the doctrine to such cases. The opinion states (at page 723):

“The rule has been most frequently applied in common carrier cases where injury has occurred to a passenger . . . ”

However, the doctrine is not limited in California to this class of cases. (See Appellant's Opening Brief, pp. 22 and 23, and the authorities there cited.)

Attention is also invited to the case of *Parker v. James E. Granger, Inc.*, 4 Cal. (2d) 668, 52 Pac. (2d) 226. In that case one airplane side-slipped into another, causing both to crash. The California Supreme Court held the doctrine of *res ipsa loquitur* to be applicable, but for the fact that the evidence failed to show that the planes were under the exclusive control



of the pilots employed by the defendant. No suggestion appears in the opinion that the application of the doctrine is in any way conditioned upon the existence of a carrier-passenger relationship.

Appellee cites several cases from other jurisdictions wherein the courts declined to apply the doctrine of *res ipsa loquitur* to airplane cases. In *Towle v. Phillips*, 180 Tenn. 121, 172 S. W. (2d) 807, the holding of the court was based upon the fact that the plane had dual controls and therefore there was no showing that it was under the exclusive control of the defendant. If the cases cited by Appellee can be considered authority for the proposition that the doctrine of *res ipsa loquitur* is, in general, inapplicable to airplane crash cases, they are contrary to the weight of authority and the basic theory behind the doctrine. In any event, as was pointed out in Appellant's Opening Brief, the acceptance by the California courts of the doctrine is binding upon Federal Courts sitting in this state.

Appellee cites *Wallar v. So. Pac. Co.*, 37 F. Supp. 475 (Dist. Ct. N. D. Calif.) on the evidentiary effect of the application of the doctrine of *res ipsa loquitur*. It does not appear that the effect given the doctrine by the state courts was considered in the Wallar case. The state law governs in this regard, and in California the

inference of negligence arising from the application of the doctrine requires a judgment in favor of the plaintiff in the absence of rebutting evidence. (See Appellant's Opening Brief, pp. 23, 24, and the authorities there cited.)

## **REPLY TO APPELLEE'S CONTENTION THAT NEGLIGENT OPERATION OF APPELLEE'S AIRPLANE WAS NOT ESTABLISHED.**

In connection with the height at which the airplane was flying immediately prior to the accident, Appellee invokes the presumption that the law has been obeyed, contained in Section 1963 (33) of the California Code of Civil Procedure. Such disputable presumptions cannot be permitted to stand in the face of uncontradicted evidence to the contrary.

*Larrabee v. Western Pac. Ry. Co.*, 173 Cal. 743, 747; 161 Pac. 750;

*Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 529; 39 Pac. 922.

In *Savings & Loan Soc. v. Burnett*, *supra*, the Court said (on page 747):

“But disputable inferences or presumptions, while evidence, are evidence the weakest and least satis-

factory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

More applicable to the case at bar would appear to be the disputable presumption contained in Section 1963 (28) of the California Code of Civil Procedure:

"That things have happened according to the ordinary course of nature and the ordinary habits of life."

Appellee quotes the remarks of the District Court which appear to deny Appellant the right to recover in the absence of eye-witnesses to the actual impact. However, no authority is cited supporting such a requirement, and, as was pointed out in Appellant's Opening Brief, the law does not impose such a requirement.

Attention is further respectfully invited to the testimony of Appellant's witnesses that after the airplane disappeared into Mission Gorge they continued to look in the direction of the gorge and that at no time did the airplane rise out of the gorge prior to the accident. (R., pp. 58, 59, 75.)

In view of the foregoing evidence, the distance and the time element involved, it is submitted that the only

conclusion that may reasonably be drawn is that the plane maintained its prior course until the impact, and that the accident was caused by the negligent manner in which Appellee's airplane was operated. The facts being undisputed, the conclusions to be drawn therefrom are for the Appellate Court upon review of the trial court's action. (See Appellant's Opening Brief, p. 16 and the authorities there cited.)

### CONCLUSION

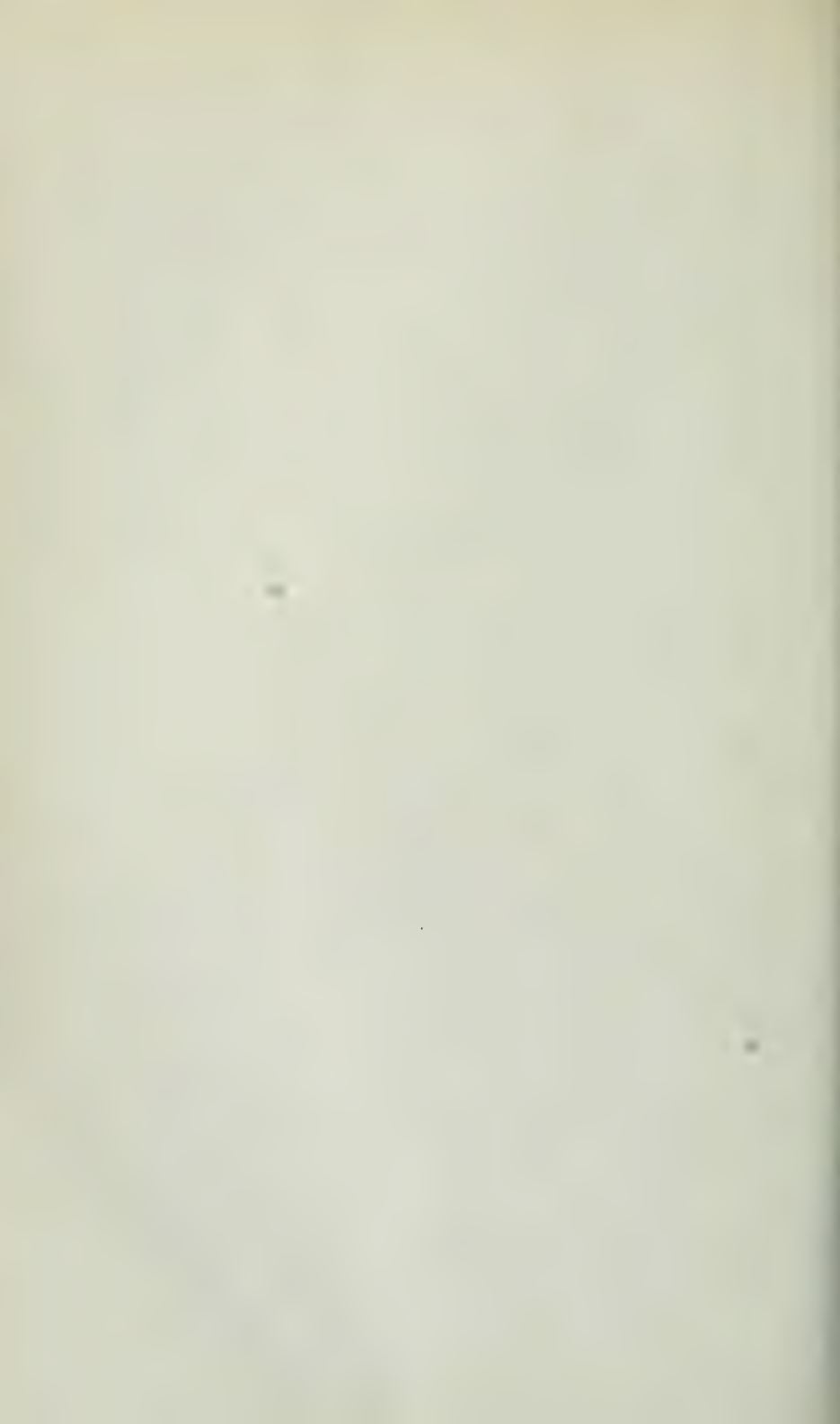
It is respectfully submitted that Appellee's position is not supported by its analysis of the case and authorities cited and that the judgment should be reversed.

Respectfully submitted,

LUCE, FORWARD, LEE & KUNZEL,

By JAMES L. FOCHT JR.,

*Attorneys for Appellant, San Diego Gas &  
Electric Company a corporation.*





11906

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United States  
Circuit Court of Appeals  
For the Ninth Circuit,

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LeROY COWAN,

Appellant,

vs.

YOUNG IRON WORKS, a corporation,

Appellee.

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Transcript of Record

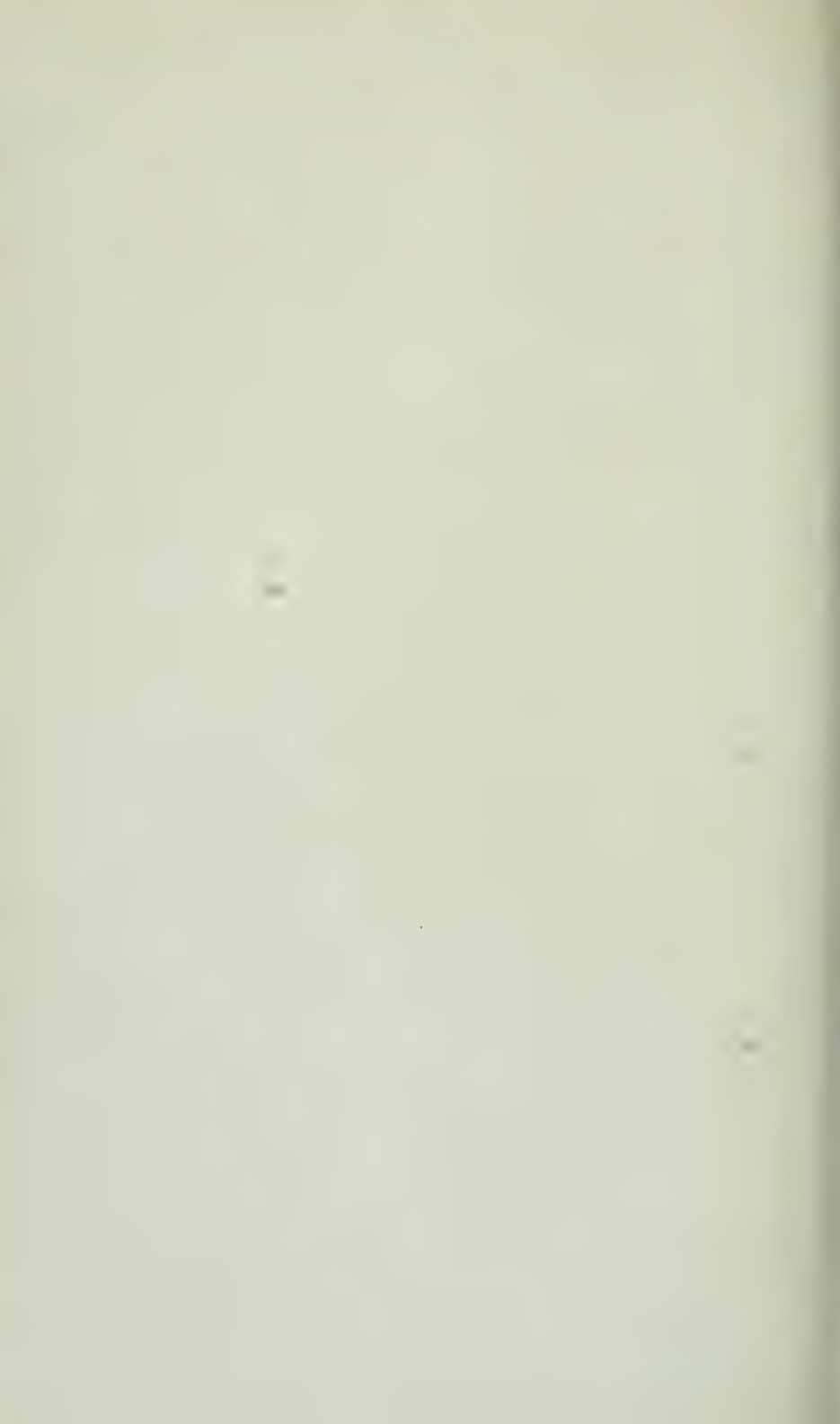
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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Northern Division

FILED

JUN 2 - 1946

PAUL P. O'BRIEN, /



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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LeROY COWAN,

Appellant,

vs.

YOUNG IRON WORKS, a corporation,

Appellee.

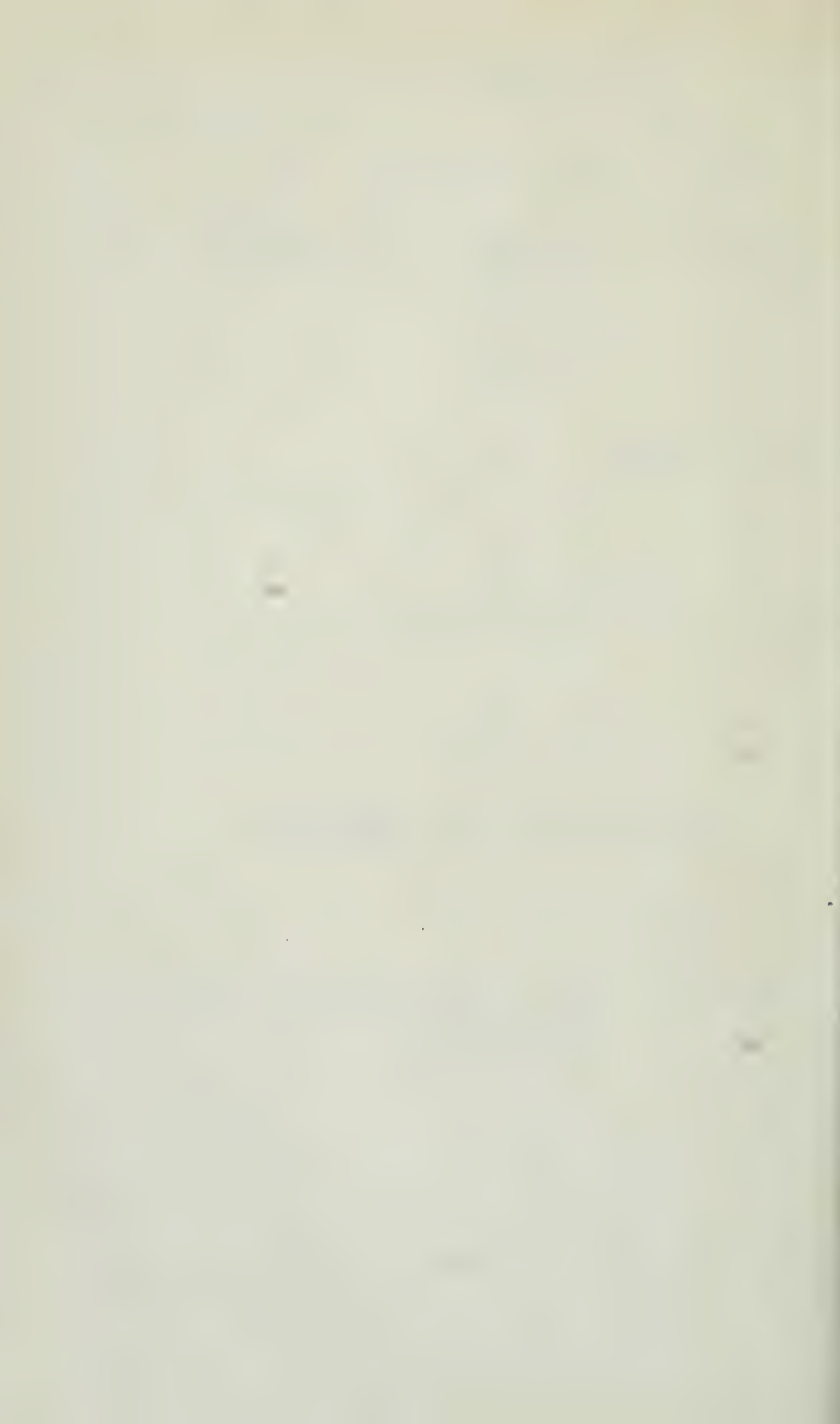
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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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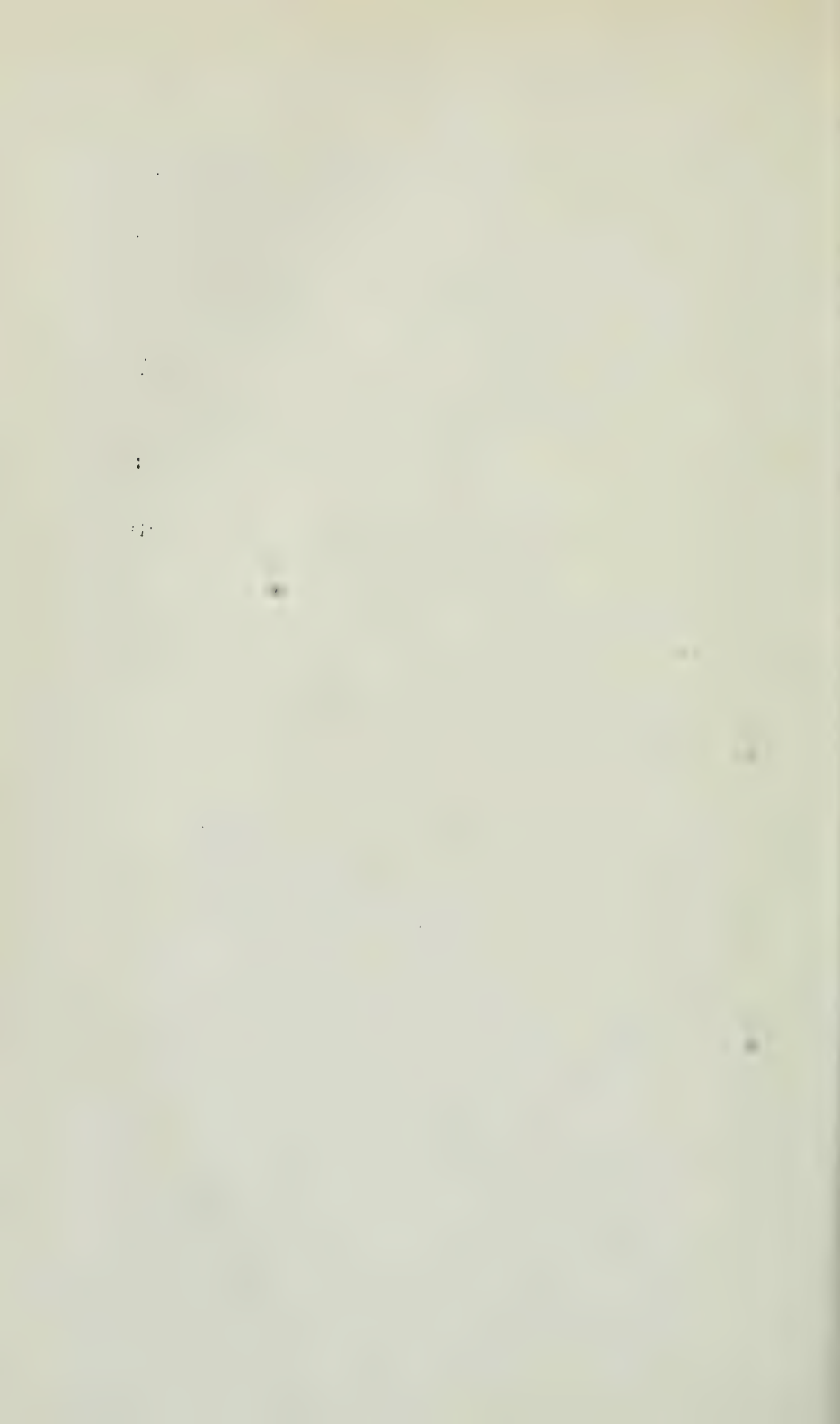


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## NAMES AND ADDRESSES OF ATTORNEYS

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Sacramento, Calif.

Attorneys for Appellee:

JOHNSON, WARE AND DAVIES,  
California State Life Bldg.,  
Sacramento, Calif.

The Superior Court of the State of California  
in and for the County of Sacramento

Dept. 2—No. 75681

LeROY COWAN,

Plaintiff,

vs.

YOUNG IRON WORKS, a corporation,  
FIRST DOE, SECOND DOE and THIRD DOE,  
Defendants.

### COMPLAINT

Now comes plaintiff above named and complains of defendants above named, and for cause of action alleges:

#### I.

That plaintiff does not know the true names of the defendants sued herein under the fictitious names of First Doe, Second Doe and Third Doe, and for that reason sues said defendants under said fictitious names and prays leave of Court to amend this complaint by inserting the true names of said defendants when the same are ascertained.

#### II.

That plaintiff is informed and believes and on that ground alleges that at all times herein mentioned the above named defendants, Young Iron Works, was and still is a corporation organized and existing under and by virtue of the laws of the State of Washington, and that at all of said times



said defendants, Young Iron Works, First Doe, Second Doe and Third Doe, were and still are doing business in the State of California. [1\*]

### III.

That at all times herein mentioned the above named defendants were engaged in the business of manufacturing and selling to the general public metallic articles of various types; that among the metallic articles so manufactured and sold by defendants, as aforesaid, were certain mechanical appliances commonly known as "swivels"; that a swivel is intended to be used and is used for the purpose of supporting cables used with derricks and other devices in lifting or pulling heavy loads, and that a swivel, when used for the purpose for which it is intended to be used, as aforesaid, is subject to great stress and is required to have tensile strength sufficient to withstand the strain of carrying such loads as are lifted or pulled by the derrick or device to which such swivel is attached.

### IV.

That at all times herein mentioned defendants knew the purpose for which a swivel is intended to be used, and is used, as aforesaid; that at all of said times defendants held themselves out to the general public as being possessed of skill and knowledge and competence in the proper manufacture of swivels; that the proper manufacture of a swivel requires, and defendant at all of said

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\* Page numbering appearing at foot of page of original certified Transcript of Record

times knew that the proper manufacture of a swivel requires, that the metal therein used be flawless, and that such swivel be properly forged and welded, and that upon completion of the making thereof such swivel be inspected and tested for defects and tensile strength by the manufacturer thereof.

V.

That at all times herein mentioned the Eldo Lumber Company was engaged in logging and lumbering operations conducted near the town of Georgetown, County of El Dorado, State of California; that on or about the 22nd day of July, 1946, said Eldo Lumber Company, in order to conduct said logging and lumbering operations at [2] the place hereinabove referred to, required a swivel for use in connection with the operation of lifting and loading timber logs on trucks by one of its derricks at said place; that on or about said date, and in order to procure such swivel, the said Eldo Lumber Company placed an order with a certain dealer engaged by defendants, at Sacramento, California, to sell swivels and other metallic appliances manufactured by defendants in the territory of Northern California, including the County of El Dorado, for a certain swivel advertised by defendants as being manufactured by them and suitable for logging and lumbering operations; that said dealer thereupon ordered said swivel from defendants; that defendants accepted and filled said order and delivered to said dealer a swivel manufactured by defendants, and upon delivery thereof

by defendants to said dealer said dealer thereupon sold and delivered the same to Eldo Lumber Company.

## VI.

That at the time defendants manufactured said swivel and at the time the same was delivered to said dealer by defendants, as aforesaid, said defendants had notice and knew that said swivel would be used to support cables utilized in lifting or pulling heavy loads by a derrick or other device and that at said times defendants further knew and had notice that said swivel would be used by the servants, agents and employees of the ultimate purchaser thereof from said dealer, and that said swivel would be apt to be used, among other things, in connection with logging and lumbering operations; that defendants then further knew and had notice that the servants, agents and employees of the ultimate purchaser thereof from said dealer would be working on and about loads carried or pulled by cables supported by means of said swivel on the derrick or device to which such swivel might be attached; that defendants then further knew [3] and had notice that said swivel would be used by the ultimate purchaser thereof from said dealer and by the servants, agents and employees of such purchaser, without being tested for its tensile strength by such purchaser or the servants, agents or employees of such purchaser; that defendants then further knew and had notice that said swivel, when used for the purpose for which it was intended to be used, and for which purpose it was used at all times herein men-

tioned, would be imminently and inherently dangerous if not properly manufactured and if any defects existed therein; and defendants then further knew and had notice that the ultimate purchaser of said swivel from said dealer, as aforesaid, and the servants, agents and employees of such purchaser would rely on defendants to properly manufacture said swivel and to inspect and test the same; that defendants then further knew and had notice that if said swivel was not properly manufactured and if any defects existed therein said swivel would be apt to break while being used for the purpose for which the same was intended to be used, and that as a proximate result of such breaking any cable, appliance or load supported or carried by such swivel would be caused to fall and be precipitated downward and cause injury to any person or to any servant, agent or employee of said purchaser who might be in proximity to or working on, about or below the derrick or device to which said swivel was attached.

## VII.

That at the time said defendants delivered said swivel to said dealer, as aforesaid, and at the time said dealer delivered the same to said Eldo Lumber Company, as aforesaid, the same was in a defective condition in that there existed flaws in the metal thereof and said swivel did not possess the tensile strength required to withstand the strain to which the same would be subjected when used for the purpose for which said swivel was manufactured by



defendants, and for which it was intended to be used, as aforesaid; that said [4] defendants carelessly and negligently manufactured said swivel and negligently failed in the manufacture thereof to use flawless material therein and to properly forge and weld the same, and that defendants carelessly and negligently failed to properly inspect and test said swivel for defects and tensile strength, and that said defective condition of said swivel was proximately caused and existed solely by reason of the said carelessness and negligence of defendants in manufacturing, inspecting and testing the said swivel as hereinabove alleged, and that as a proximate result of said carelessness and negligence of said defendants said swivel was inherently dangerous and unsuitable and unsafe for the purpose for which the same was intended to be used, as aforesaid, and for which purpose defendants knew and had notice the same was intended to be used.

### VIII.

That said defective condition of said swivel hereinabove referred to was latent and was not known and could not be known by said Eldo Lumber Company and its servants, agents or employees in the exercise of ordinary care, and that at the time said swivel was sold and delivered by said dealer hereinabove referred to to said Eldo Lumber Company, as aforesaid, and at the time said swivel was used by said Eldo Lumber Company, as hereinafter alleged, said Eldo Lumber Company and the servants, agents and employees thereof, including plaintiff,



relied on the fact that said swivel was properly manufactured, inspected and tested by defendants, and that said swivel was free from defects and suitable for the purpose for which the same was intended to be used, as aforesaid.

### IX.

That at all times herein mentioned plaintiff was a servant, agent and employee of the said Eldo Lumber Company herein referred to, and was engaged in the course and scope of his employment in working on and about the place where said logging and lumbering operations [5] were being conducted by said Eldo Lumber Company, as aforesaid.

### X.

That on or about the 12th day of August, 1946, and at the place of its said logging and lumbering operations hereinabove referred to, and in reliance on the fact that said swivel was properly manufactured, inspected and tested by defendants, and that said swivel was free from defects and suitable for the purpose for which the same was intended to be used, as aforesaid, the said Eldo Lumber Company, in the course of its said logging and lumbering operations, commenced using said swivel in conjunction with a certain derrick utilized in lifting and loading timber logs on to trucks; that on or about said date, and while said swivel was being used in a proper manner by said Eldo Lumber Company for the purpose for which said swivel was intended to be used, as aforesaid, and while said derrick was engaged in lifting a certain timber log

by means of a cable supported by said swivel said swivel burst asunder and broke; that by reason of the bursting asunder and breaking of said swivel, as aforesaid, the cable and other appliances supported thereby were precipitated downward onto the ground; that said swivel so burst asunder and broke and said cable and appliances supported thereby were precipitated downward solely by reason of said defective condition of said swivel, which was caused as the proximate result of the carelessness and negligence of defendants, as hereinabove alleged; that at the time said swivel so burst asunder and broke, and at the time said cable and appliances supported thereby were precipitated downward, plaintiff was working in proximity to said derrick to which said swivel had been attached, and that upon the said cable and appliances supported by said swivel being precipitated downward, as aforesaid, plaintiff, as a proximate result thereof and of the bursting asunder and breaking of said swivel, as aforesaid, was caused to be struck by said cable and appliances supported by said swivel, and as a proximate result thereof was caused to and did sustain the following injuries: [6]

Severe fractures of the bone structure of the skull; concussion of the brain resulting in severe injury to the tissue, cells and nerve centers thereof; lacerations on and about the head; severe shock to the physical and nervous system;

and as a proximate result of said injuries sustained as aforesaid, plaintiff was rendered unconscious for

a long period of time and was caused to be hospitalized, was required to submit to various surgical procedures, was caused to endure pain and suffering, and was caused to be wholly disabled, and that as a further proximate result of said injuries sustained as aforesaid, the memory of plaintiff has become impaired, his eyesight and sense of smell have become affected, his powers of thought, concentration and reaction to mental impulses are diminished, he has become subject to headaches and dizzy spells, his nervous system has become upset, and his ability to withstand the stress and strain of ordinary everyday activity is grievously impaired; that plaintiff is informed and believes and on that ground alleges that the said results of said injuries are permanent in character and that he will be affected thereby during the balance of his life.

## XI.

That as a proximate result of said carelessness and negligence of said defendants in causing plaintiff to sustain and suffer said injuries, as hereinabove alleged, plaintiff has sustained general damages in the sum of \$50,000.00.

## XII.

That as a proximate result of said carelessness and negligence of said defendants in causing plaintiff to sustain and suffer said injuries, as hereinabove alleged, plaintiff was necessarily obliged to and did procure hospitalization, ambulance hire, X-rays, and the services of nurses, physicians and

surgeons in the treatment of said injuries, and that the following liabilities were incurred therefor:

Hospitalization and X-rays.....	\$1,063.81
Ambulance hire.....	50.16
Nurses .....	999.00
Physicians and surgeons.....	629.25
<hr/>	
Total .....	\$2,742.22

and that each of said amounts hereinabove set forth is the reasonable value of the respective items represented thereby; that plaintiff is informed and believes and on that ground alleges that he will be required to procure further medical care in the treatment of his said injuries, and that liability be incurred therefor in an amount not now known, and plaintiff prays leave of Court to amend this complaint by insertion of such amount when the same is ascertained.

### XIII.

That on the said 12th day of August, 1946, said plaintiff was of the age of 25 years, and at said time and prior thereto he was in perfect health and able-bodied, and was regularly employed and capable of earning and in receipt of earnings from his said employment in the sum of approximately \$10.00 per day; that by reason of said injuries sustained as aforesaid, said plaintiff has ever since said date been wholly disabled from engaging in the employment in which he was engaged on said date, or any like employment, and that with the exception of a three-week period during which light work



was attempted by plaintiff, plaintiff has been wholly disabled from engaging in any employment whatever to the date hereof, and that by reason thereof has been deprived of earnings to date in the sum of \$2,090.00; that plaintiff is informed and believes and on that ground alleges that as a proximate result of said injuries sustained as aforesaid, his capacity for engaging in employment and ability to earn money in the future will be permanently impaired.

Wherefore, plaintiff prays for judgment against defendants in the sum of \$54,832.22, for costs of suit herein incurred, and for such other and further relief as to the Court may seem meet and proper.

(Verification.)

ARCHIBALD D. McDOUGALL,  
Attorney for Plaintiff. [8]

[Endorsed]: Filed Apr. 18, 1947. [9]

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[Title of Superior Court and Cause.]

ORDER DIRECTING SERVICE OF SUM-  
MONS ON FOREIGN CORPORATION IN  
MANNER PRESCRIBED BY SECTION 406  
(a) OF THE CIVIL CODE

It appearing to the satisfaction of the Court that due diligence and diligent search has been made on behalf of plaintiff above named to find and locate in the State of California the officers or agents of the above-named defendant, Young Iron Works, occu-



pying the status set forth in Section 406(a) of the Civil Code, but that none of the said officers or agents can be found in this state; and it further appearing to the satisfaction of the Court that said defendant, Young Iron Works, has not designated an agent in California upon whom process may be served; and it further appearing to the satisfaction of the Court that said defendant, Young Iron Works, is a foreign corporation organized and existing under and by virtue of the laws of the State of Washington; and it further appearing to the satisfaction of the Court that service of process in the above-entitled action should be made on said defendant, Young Iron Works, in the manner provided by Section 406 (a) [10] of the Civil Code of California; and other good cause appearing therefor;

It Is Hereby Ordered that service of summons in the above-entitled action on the above-named defendant, Young Iron Works, be made as provided by Section 406(a) of the Civil Code of California.

Dated this 29th day of May, 1947.

PETER J. SHIELDS,

Judge of the Superior Court.

[Endorsed]: Filed May 29, 1947. [11]

[Title of Superior Court and Cause.]

AFFIDAVIT FOR ORDER DIRECTING SERVICE OF PROCESS ON FOREIGN CORPORATION UNDER SECTION 406(a) OF THE CIVIL CODE

State of California,  
County of Sacramento—ss.

Lloyd G. Buchler, being first duly sworn, deposes and says:

That he is one of the attorneys of record for the above-named plaintiff; that he is familiar with all of the facts in this action; and that he makes this affidavit for and on behalf of said plaintiff for the purpose of showing diligent search in this state for agents or officers of the above-named defendant, Young Iron Works, upon whom service of process can be made in this action;

That affiant is informed and believes and on that ground avers that at all times mentioned in plaintiff's complaint herein the above-named defendant, Young Iron Works, was and is now a foreign corporation organized and existing under the laws of the State of Washington, and that said defendant, Young Iron Works, was [12] at all of said times mentioned in plaintiff's complaint and is now doing business within the State of California;

That immediately following the filing of the complaint in this action on April 18, 1947, affiant caused inquiry to be made of the Secretary of State of the State of California to determine whether or not any person had been designated by said Young Iron

Works under the provisions of Section 405 of the Civil Code as its agent in California upon whom process directed to said Young Iron Works might be served, but that affiant is informed and believes and on that ground avers that no such agent has been so designated by said Young Iron Works in this state; that thereupon affiant contacted Thomas H. Lynn, Assistant Sales Manager of Weaver Tractor Company, located at Nineteenth and "T" Streets, Sacramento, California, and was advised that said Weaver Tractor Company was the exclusive dealer and agent for the sale of products of said Young Iron Works in the territory comprising Sacramento, El Dorado, Amador and Yolo Counties in the State of California, but that said Weaver Tractor Company was not authorized to accept service of process for or on behalf of said Young Iron Works; that affiant was further informed by the said Thomas H. Lynn that neither the president or other head of said Young Iron Works, or a vice-president, a secretary, an assistant secretary, or any other officer or general manager of said Young Iron Works resided or was located in the State of California, and that none of such officers could be found within this state; that affiant was further informed by the said Thomas H. Lynn that the only representatives of said Young Iron Works calling upon the said Weaver Tractor Company in the normal course of business were salesmen or sales agents, and that none of said salesmen or sales agents were officers or persons authorized to accept service of process on behalf of said Young

Iron Works in this state; that affiant was further informed by [13] the said Thomas H. Lynn there was a possibility further information concerning the matter of whether any officers or agents of said Young Iron Works authorized to accept service of process could be found in this state could be obtained by contacting Barnett Company, located in San Francisco, California, which said Barnett Company was reputed to be a distributing agent of said Young Iron Works in this state; that thereafter affiant caused the said Barnett Company to be contacted in San Francisco, California, but was advised that said Barnett Company no longer represented or acted on behalf of said Young Iron Works in California, but that a certain firm known as the Lumbermen's Supply Company, located in San Francisco, California, were now acting as the sales representative and distributing agent of said defendant, Young Iron Works, in the State of California; that thereupon affiant contacted the said Lumbermen's Supply Company, whose office is located on Main Street in San Francisco, California, and was informed by one George D. Oliver, Jr., bearing an official capacity with said Lumbermen's Supply Company, that his firm represented the said defendant, Young Iron Works, in California as a manufacturing agent and dealer in the vicinity of San Francisco, but that said Lumbermen's Supply Company was not authorized to accept service of process on behalf of said Young Iron Works; that affiant was likewise informed by the said George D. Oliver, Jr., of said Lumbermen's Supply Company,



that there was no officer or agent of said Young Iron Works located in California upon whom service of process directed to said corporation could be made;

That notwithstanding his search therefor, affiant has not been able to find any of the officers or agents set forth in Section 406(a) of the Civil Code upon whom service of process can be made on behalf of said defendant, Young Iron Works, and that affiant is informed and believes and on that ground avers that there are no such officers or agents located in this state. [14]

Wherefore, affiant prays that an order be made by the above-entitled Court finding that due diligence and diligent search has been exercised in attempting to locate in California any of the officers or agents referred to in Section 406(a) of the Civil Code upon whom service of process can be made on behalf of said defendant, Young Iron Works, within the State of California, and that such order direct that service of summons be made by delivery thereof to the Secretary of the State of California in accordance with the provisions of said Section 406(a) of the Civil Code.

LLOYD G. BUCHLER.

Subscribed and sworn to before me this 29th day of May, 1947.

GLADYS H. DENNIS,

Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed May 29, 1947. [15]



[Title of Superior Court and Cause.]

AFFIDAVIT OF PAUL J. ISAACSON

State of Washington,

County of King—ss.

Comes Now Paul J. Isaacson and, being first duly sworn, on oath deposes and says:

1. Affiant is the President of Young Iron Works, a Washington corporation, of Seattle, Washington, and makes this affidavit on behalf of said corporation, but affiant does so by way of a special appearance only in the above-entitled proceeding; that is, under protest and solely for the purpose of challenging the service of process, if any, claimed to have been upon said Young Iron Works, a corporation, and to support any appropriate motions or objections which may be made to said purported service of process or for the purpose of quashing the above-entitled proceeding, and for the purpose of objecting to the jurisdiction of the above-entitled court over said corporation or any matter affecting the interests of said corporation. This affidavit is further made without admitting or intending to admit by implication the truth of any of the allegations made by the plaintiff in the above-entitled action.

2. Said corporation does not do business in the State [16] of California and never has done business there.

3. Said corporation was organized and exists only under the laws of the State of Washington. Said corporation is engaged in manufacturing in Seattle, Washington, simple mechanical devices such

as blocks, tongs, hooks, swivels, sockets, shackles, clevises, and said corporation's only offices are in Seattle, Washington. Said corporation's only manufacturing plant is in Seattle, Washington. Said corporation's only place of business is in Seattle, Washington. Said corporation has no merchandise or stock of goods of any kind or character at any place other than in Seattle, Washington, at its said plant and place of business.

4. In California said corporation neither has nor maintains any offices or place of business, nor has it any employees or agents or sales organization or representatives of any kind or character for any purpose whatsoever.

5. Said corporation's products are manufactured only in Seattle, Washington, are sold only from Seattle, Washington, and shipped only from Seattle, Washington. Said corporation has no stock of goods or parts in California nor on consignment nor in storage there.

6. All sales of said corporation's products are made in Seattle, Washington. Any sales made to California customers are made in interstate commerce. Said corporation has one salesman who visits prospective customers in various western states approximately twice a year to solicit orders. He resides in Seattle, Washington. He does not take up any residence in California, nor has he ever established any office or place of business in California. All orders for said corporation's products are submitted to said Seattle office and all sales are made from Seattle.

7. Customers in California for said corporation's products include dealers who handle mining, quarrying, logging and [17] marine equipment.

8. This corporation has no contracts or agreements with dealers, distributors, factory representatives or any other agencies whatsoever for the handling or sale of said corporation's products in California, or for the representation of said corporation in California, or for any other purpose whatsoever. No California customer for the corporation's products and no California dealer or merchant handling the types of devices manufactured by the corporation is affiliated with or a subsidiary of said corporation in any way. Said corporation has no financial or other interest in any business, merchant or dealer in California who may buy, use or sell products manufactured by the corporation, nor are there any such persons, firms or corporations having any interest in said corporation.

9. Such dealers in California who handle tools or devices used by the mining, quarrying, logging or marine industries and who purchase products of said corporation for their business ordinarily do so pursuant to orders sent in by mail to the Seattle office of the corporation. Such orders are accepted in Seattle and filled from stock or manufactured at Seattle.

10. All customers of said corporation, including any dealers or other users of said products who are in California place their orders with this corporation and buy direct for their own accounts. The corporation has no interest in the goods shipped to

said customers and the only goods shipped into California by this corporation have been sold by the corporation to its customers.

11. The devices manufactured by the corporation are simple metal or mechanical parts or forms of devices, readily installed and adapted by purchasers to their own needs. No installation or engineering service is required for either the use or sale of the products and the corporation furnishes no engineers, [18] installers or mechanics of any kind.

12. No maintenance or servicing of products by the factory is required in order to make or complete sales and the corporation has no mechanics, maintenance, or other people in California or elsewhere.

13. No stock of replacement parts is needed in California and no stock of parts for the products of the corporation are maintained in California or elsewhere.

14. The corporation neither maintains nor participates in any exhibits, displays or demonstrations of its products in California.

15. Such customers in California who may have bought the products of the corporation and may resell the same in the course of their own businesses do so entirely for their own accounts. The corporation has no interest in said resales nor in the collection of the proceeds of such sales. No one in California makes any sales or transactions for the account of the corporation or in which the corporation has any interest.



16. The corporation does not maintain bank or other accounts in any form in the State of California.

PAUL J. ISAACSON.

Subscribed and Sworn to before me this 23d day of June, 1947.

[Seal]                      EDWARD DUFF MURRAY,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [19]

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[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO  
THE UNITED STATES DISTRICT COURT

To the Honorable the Superior Court of the State  
of California in and for the County of Sacramento:

The petition of Young Iron Works, a corporation, the defendant in the above entitled action, respectfully shows:

That said action was brought and is pending in the Superior Court of the State of California, in and for the County of Sacramento.

That the time within which said defendant is required to plead or answer to the complaint of the plaintiff on file in said action under the laws of the State of California and the rules of said court has not expired.

That said defendant has appeared specially and



not otherwise in said action by way of a motion to quash service of summons and said defendant reserves such special appearance and all rights under said motion to quash.

That said action is an action for damages to wit: an action by the plaintiff to recover the sum of \$54,832.22 from the defendant, Young Iron Works, a corporation; that said claim is based on the following allegations: that plaintiff was injured on or about the 22nd day of July, 1946, while employed by the Eldo [20] Lumber Company and while engaged in certain logging operations as the result of the alleged breaking of a swivel which plaintiff alleges was negligently and carelessly manufactured by this defendant and which was inherently dangerous due to latent flaws and defects therein; reference is hereby made to the complaint on file herein for further particulars and by such reference incorporated herein as though fully set forth herein.

That said action is one over which the District Court of the United States has jurisdiction under the provisions of Section 24, as amended, of the Judicial Code of the United States.

That said action is between citizens of different states.

That said plaintiff was at the time of the commencement of said action, and ever since has been, and is now, a citizen, resident and inhabitant of the County of Sacramento, State of California, and of the Northern District of California, Northern Division of the United States District Court.

That the defendant, Young Iron Works, a corporation, was at the time of the commencement of this action, and ever since has been, and is now, a corporation organized and existing under and by virtue of the laws of the State of Washington, and a citizen, subject, resident and inhabitant of the said State of Washington, and was not at said time and is not now a resident, citizen, subject or inhabitant of the State of California.

That the defendant, Young Iron Works, a corporation, is the only necessary and proper party defendant for a complete determination of the subject matter of said action; that the defendants sued herein under fictitious names are non-existent and have no interest in said action; that no relief can be granted against the defendants sued under fictitious names.

That no prior application has been made to any court or Judge for the order applied for in this petition.

That petitioner desires to remove said action before any [21] further proceedings are taken therein to the District Court of the United States for the Northern District of California, Northern Division, said court being the court to be held in the district and division where this action is pending, and your petitioner offers and files herein a bond with good and sufficient security for its entering and filing in said District Court of the United States for the Northern District of California, Northern Division, within thirty days from the date of filing this peti-

tion, a certified copy of the record in this action and paying all costs that may be awarded by said District Court, if said District Court should hold that said action was wrongfully and improperly removed thereto.

Wherefore, your petitioner prays that this honorable Court to proceed no further herein except to accept this petition and surety bond, and make an order staying further proceedings herein, and to cause the record herein to be removed to the said District Court of the United States for the Northern District of California, Northern Division.

/s/ GERALD R. JOHNSON,  
JOHNSON, WARE AND  
DAVIES,

Attorneys for Defendant,  
Young Iron Works, a corporation.

(Verification)

[Endorsed]: Filed July 1, 1947. [22]

In the Superior Court of the State of California  
in and for the County of Sacramento

Dept. 2—No. 75681

LeROY COWAN,

Plaintiff,

vs.

YOUNG IRON WORKS, a corporation, FIRST  
DOE, SECOND DOE and THIRD DOE,  
Defendants.

ORDER FOR REMOVAL OF CAUSE TO  
UNITED STATES COURT

Upon reading and filing the petition of Young Iron Works, a corporation, the defendant in the above entitled action, and upon filing the bond, and good and sufficient sureties having been offered by said defendant in the premises, and the same being by me, the Judge of said Superior Court, duly accepted, it is hereby ordered that no further proceedings be had in this cause, and the removal of the same to the District Court of the United States for the Northern District of California, Northern Division, be, and the same is, hereby allowed and ordered, in accordance with the aforesaid petition and the statute of the United States in such case made and provided.

Dated: July 1, 1947.

PETER J. SHIELDS,

Judge of the Superior Court.

[Endorsed]: Filed July 1, 1947. [23]



[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH  
SERVICE OF SUMMONS

To LeRoy Cowan, the above named plaintiff, and  
to his attorneys Archibald D. McDougall, and  
Mento and Buchler:

Please take notice that the undersigned, appearing specially for the purpose of this motion, will move this Court, at the Courtroom of said Court, United States Post Office Building, 8th and "I" Streets, Sacramento, California, on the 1st day of September, 1947, at 3:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order quashing the attempted service of summons herein on the Young Iron Works, a corporation, defendant in the above entitled cause, on the following grounds:

1. That said attempted service of summons upon defendant Young Iron Works, a corporation, was made by plaintiff on the 2nd day of June, 1947, by delivering to the Secretary of State, State of California, a statement of the address of the above named defendant Young Iron Works, a corporation, to wit: 2959 First Avenue, South, Seattle, Washington, together with a copy of the Summons and Complaint issued and filed in the case of

Cowan vs. Young Iron Works, a corporation, et al., No. 75681, Department 2, of the Superior Court of the State of California, in and for the [24] County of Sacramento,



with instructions to said Secretary of State to give notice to said Young Iron Works of the process served upon him in said action, and to forward a copy of such process to said Young Iron Works, at said address in accordance with the provisions of Section 406(a) of the Civil Code of California.

2. That the said defendant is a corporation of the State of Washington, with its principal place of business in Seattle, State of Washington, and was not on the 2nd day of June, 1947, or at any time during the year 1947, or at any time prior thereto, and is not now a resident or citizen of the State of California, or of the Northern District of California, Northern Division, and was not on the 2nd day of June, 1947, or at any other time during said year, or at any time prior thereto, and is not now, transacting or carrying on any business within the State of California, or within the Northern District of California, Northern Division, as defined by Section 405 of the Civil Code of California, and is not now subject to the jurisdiction of the above entitled Court, or to the jurisdiction of any Court, either State or Federal, within the State of California; that said defendant has not authorized said Secretary of State, nor any deputy of said Secretary of State, nor any other person within the State of California, to receive service of process or summons for or on its behalf, and has not waived service or process herein by voluntary appearance or otherwise.

Said motion will be made and based upon this notice, upon affidavit of Paul J. Isaacson, a certi-

fied and authenticated copy of which is on file herein, and a copy of which was heretofore, to wit, on the 30th day of June, 1947, served upon you; upon the certificate of Frank M. Jordan, Secretary of State, State of California, dated the 3rd day of July, 1947, a copy of which is served herewith, and upon all the files and papers in said cause. [25]

GERALD R. JOHNSON,  
JOHNSON, WARE AND  
DAVIES,

By /s/ GERALD R. JOHNSON,

Attorneys for defendant, Young Iron Works, a corporation, appearing specially and for the purpose of this motion only.

In the opinion of counsel, the foregoing motion is well taken and is not interposed for the purpose of delay.

Dated: July 28, 1947.

/s/ GERALD R. JOHNSON.

[Endorsed]: Filed July 29, 1947. [26]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO  
TAKE DEPOSITIONS

*In* appearing to the satisfaction of the Court that the above-named defendant Young Iron Works, a corporation, has filed herein a motion to quash service of summons on the grounds that said defendant is a foreign corporation and is not doing business in the State of California, and it is further appearing that plaintiff is desirous of taking the depositions of Thomas H. Lynn and Albert S. Weaver, Jr., for the purpose of obtaining testimony for use in opposition to said motion and to disprove certain of the allegations contained in the affidavit filed herein on behalf of said defendant in support of said motion; and good cause appearing therefor:

It is hereby ordered that said plaintiff be and he is hereby granted leave to take the said deposition of said Thomas H. Lynn and Albert S. Weaver, Jr., upon oral examination for use in connection with the said motion hereinabove referred to.

Dated this 18th day of August, 1947.

DAL M. LEMMON,  
United States District Court  
Judge.

[Endorsed]: Filed Aug. 18, 1947. [27]

[Title of District Court and Cause.]

## OPINION AND ORDER

This case was transferred to this court from a state court upon diversity of citizenship. Young Iron Works has moved under rule 12(b), Rules of Civil Procedure, to quash service of summons upon it.

The supporting affidavit states that the defendant corporation is organized under the laws of the State of Washington and that it is engaged in a manufacturing business in that state. It has no stock of goods and maintains no office or place of business in California. The customers of the manufactured products are dealers who handle mining, quarrying, logging and marine equipment, or other users, all of whom place their orders and buy direct for their own accounts. Shipments are made from Washington to California to fill these orders. The corporation has one salesman who resides in Washington and who visits prospective customers in various western states once or twice a year. No installation, engineering or maintenance service is performed by defendant in California. No sales or transactions are made in this state for the account of the corporation. Depositions were received in evidence of two officials of the Weaver Tractor Company, a California corporation. These depositions reveal that the Weaver concern [28] has the exclusive right to handle defendant's products in what is loosely referred to as the "Sacramento Valley area" and that catalogues are supplied by

defendant to Weaver. A representative of defendant visits Weaver's place of business in California approximately once each six months, and "checks over" the Weaver stock, "discusses some of the features of his line of merchandise" and occasionally accompanys the Weaver salesmen when they call upon the "larger logging accounts." If a customer claimed the product defective, Weaver would send it to defendant. Defendant's decision as to whether a credit for a claimed defect is to be allowed is final.

Service may be made upon a foreign corporation in the manner prescribed by the law of the state, Rule 4(d) (7) F.R.C.P. Whether defendant was doing business depends upon its activities at the time of the service of the summons. *Jameson v. Simonds Saw Co.* 2 Cal. App. 582. They were as above outlined.

The early concept was that before a foreign corporation can be subjected to the jurisdiction of a state, the corporation must have consented to the jurisdiction. Consent might be implied by its activities. The "consent theory" has given away to the "corporate presence theory." *West Publishing Co. v. Superior Court*, 20 Cal. (2d) 720. The later theory is thus expressed in *Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, "a foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there." The extent and nature of the



corporation's activities sufficient to constitute presence is often a perplexing problem. In attempting to lay down a more explicit guide the Supreme Court of Oklahoma in *Wills v. National Mineral Co.*, 55 P (2d) 449 stated: [29]

“Business is largely the barter, sale, or exchange of things of value, usually property. ‘Doing’ business is therefore the engaging in such pursuit. The doing of business involves not only the ownership, possession, or control of property, but such functions as dealing with others in reference to the property, the exercise of discretion, the making of business decisions, the execution of contracts. It includes the functions of marketing the product, by advertising and solicitation, and of collecting for the sold product. It may conservatively be said that wherever an important combination of these functions is being performed, business is being done. A corporation moves and acts only in the persons of its agents, be they officers or otherwise, within the scope or apparent scope of their authority. Therefore, wherever the agent is performing important business functions for the corporation, involving the exercise of discretion, whereunder contractual relationships are by his efforts established between the corporation and others in that place, the corporation is ‘present’ and doing business.”

The functions performed by the defendants' agent is not of such purport to constitute doing business.

Had he been in the state simply for the taking of orders, this would not amount to doing business. *International Harvester Co. v. Comm. of Kentucky*, 234 U. S. 579; *Roark v. Am. Distilling Co.*, 97 F. (2d) 297; cases cited in 146 A. L. R. at page 948. The agent did not take orders. He merely advised Weaver as to his stock and defendant's product. On the infrequent and irregular occasions he accompanied the Weaver salesmen to visit Weaver customers his actions were a courtesy to Weaver. His principal had no relations with those customers. Defendant was not making sales to them or otherwise dealing with them either through its representatives or through Weaver. Likewise the replacement of parts as performed by defendant is insufficient to constitute presence within the state. The replacements are made pursuant to the contractual relations with Weaver and are of no greater weight in determining the issue than are the original interstate purchases. [30]

We do not have here the undertaking to service or keep in repair in California the produce sold which would make the corporation amenable to service of process in that state. *Milbank v. Standard Motor Construction Co.* 132 Cal. App. 67; *Vilter Mfg. Co. v. Rolaff*, 110 F. (2d) 491; *State v. District Ct.*, 57 P. (2d) 772; *Gray Co. v. Ward*, 145 S. W. (2d) 650; or the plurality of transactions, "the combination of which would constitute doing business" as existed in *Wells v. National Mineral Co.* 55 P. (2d) 449 and *Dahl v. Collette*, 279 N. W. 561. The situation here and that in *Carroll Electric*

c. v. Freed Eisemann Radio Corp. 50 F (2d) 993 and Thew Shovel Co. v. Superior Court, 35 Cal. App. (2d) 183, cases upon which plaintiff relies heavily, are quite dissimilar. In the Carroll case the contract between the manufacturer and the distributor created a "limited agency." "The distributor was not an independent merchant dealing with the manufacturer upon its own initiative, but conducted its business in the District of Columbia in conformity with the stipulations contained in the contract." Here Weaver is an independent merchant and is in no wise under the control or discretion of defendant. The quotation from the Thew case, which affords comfort to plaintiff, must be read in the light of the facts to which it relates. Often an announced legal principle is misleading when torn from its moorings. Generalization, must be valued in the light of the circumstances which gave them expression. There the manufacturer reserved the right to make sales to customers of certain classes without paying discounts or commissions to the distributors, prices and conditions of sales were fixed by the manufacturer, title to consigned goods was retained by the manufacturer and contracts for the resale and notes on account of deferred payments were assigned to and accepted by the manufacturer, installation service was provided and other activities performed by it.

Defendant exercised no control over Weaver. [31] Weaver bought the products f.o.b. Seattle. Title to the purchased goods passed to Weaver before they

came into California. Defendant made no sales, and neither owned nor possessed any of its product in that state. It neither installed nor serviced the manufactured articles. Weaver was free to sell as it chose, unhampered by direction from defendant. Defendant did not make the business decisions, market its product there, solicit sales on its account, execute contracts of sale or make collections. The facts here point no stronger, if as strong, to doing business as those found in *McMillan Process Co. v. Brown* 33 Cal. App. (2d) 279 to be inadequate. See also *Hinchcliffe Motors v. Willys Overland Motors* 30 F. Supp. 580 and *Davega Inc. v. Lincoln Furniture Mfg. Co.* 29 F. (2d) 164.

I hold that the facts disclose that defendant did not engage in the regular continued and sustained course of business in California necessary to constitute doing business there. Rather, its activities were casual or occasional. *Mueller Brass Co. v. Alexander Milburn Co.* 152 F. (2d) 142.

It is ordered that the service of summons upon the defendant be and it is quashed.

Dated: January 28, 1948.

DAL M. LEMMON,

United State District Judge.

[Endorsed]: Filed Jan. 28, 1948.

Entered in Civil Docket Jan. 29, 1948. [32]

United States District Court for the Northern  
District of California, Northern Division

No. 5870

LeROY COWAN,

Plaintiff,

vs.

YOUNG IRON WORKS, a corporation,

Defendant.

DISMISSAL OF ACTION AS TO DEFEND-  
ANTS FIRST DOE, SECOND DOE AND  
THIRD DOE

To the Clerk of the Above Entitled Court:

The above entitled action is hereby dismissed with-  
out prejudice as to the defendants sued herein under  
the fictitious names of First Doe, Second Doe and  
Third Doe.

ARCHIBALD D. McDOUGALL,  
Attorney for Plaintiff.

[Endorsed]. Filed March 19, 1948. [33]



## CIVIL DOCKET

Date	Filings—Proceedings
7/28/47— 1	Filed record on removal (Clerk's fees—Defendant, \$15.00) Complaint
7/29/47— 2	Filed notice of motion to quash service of summons
8/18/47— 3	Filed order granting leave to take depositions
8/19/47— 4	Filed praecipe Issued subpoena
	5 Filed order allowing use of subp, etc
	6 Filed notice of time & place of taking depositions
9/ 9/47— 7	Filed depositions of A. S. Weaver, Jr. and T. H. Lynn
9/10/47—	Ord mo. to quash service of summons contd Oct. 6
9/16/47— 8	Filed notice of filing depositions
10/ 6/47—	Ord mo. to quash service of summons con. Oct 13
10/16/47—	Ord contd Nov. 17—notified attys
11/15/47— 9	Filed memo of auth's. in opposition to motion to quash service of summons
11/17/47—	Hearing; ord briefs filed in 10-10 days, mo. to quash then to be submitted
11/28/47—10	Filed reply brief of deft Young Iron Works
12/20/47—11	Filed pltf's closing memo in opposition to mo to quash
12/31/47—	Ord mo to quash service of summons submitted
1/28/48—12	Filed opinion and order Ord mo to quash service of summons granted
1/29/48—	Entered opinion & order, Vol 13 #99
2/ 6/48—13	Filed notice of order quashing service of summons
3/19/48—14	Filed dismissal as to defts First, Second & Third Does
	15 Filed notice of appeal to CCA from order quashing service of summons—notified deft (Clerk's fee—Plaintiff, \$5.00)
	16 Filed bond on appeal
3/30/48—17	Filed stip for designation of record on appeal
3/31/48—18	Filed stip & order for transmission of original depositions, etc.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice is hereby given that LeRoy Cowan, the above-named plaintiff, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order made on January 28, 1948 and entered on January 29, 1948, in the above entitled action, wherein it was ordered that the service of summons in the above action upon the above named defendant Young Iron Works, a corporation, be quashed.

ARCHIBALD D. McDOUGALL,  
Attorney for Appellate,

LeRoy Cowan.

[Endorsed]: Filed March 19, 1948. [35]

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[Title of District Court and Cause.]

BOND ON APPEAL FOR COSTS

Know All Men by These Presents: That the undersigned, Standard Accident Insurance Company, a corporation duly organized and existing under the laws of the State of Michigan, and duly authorized to transact and do a general surety business in the State of California, is held and firmly bound unto the above named defendant, Young Iron Works, a corporation, in the full and just sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to the payment of which sum, well and truly to be made, the said Standard Accident Insurance Company, a corporation, binds itself, its successors and

assigns, jointly and severally, firmly by these presents.

Whereas, lately at the District Court of the United States for the Northern District of California, Northern Division, in a suit pending in said Court, between the above named plaintiff, LeRoy Cowan, and above named defendant, Young Iron Works, a corporation, a certain order was made and entered in said Court [36] on or about January 29, 1948, quashing service of summons in the above action on said defendant; and

Whereas, said above named plaintiff LeRoy Cowan, has filed a notice of appeal herein, appealing to the United States Circuit Court of Appeals for the Ninth Circuit, from said order for the purpose of reversing the same.

Now, Therefore, the condition of this obligation is such that if the said above named plaintiff, LeRoy Cowan, shall pay all costs if the said appeal is dismissed or the said order affirmed, or such costs as the appellate court may award if the said order appealed from is modified, then this obligation shall be null and void, otherwise it shall remain in full force and effect. In Witness Whereof, the said undersigned surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact at Sacramento, California, the 18th day of March, 1948.

[Seal]

STANDARD ACCIDENT  
INSURANCE COMPANY.

By /s/ S. M. SWANSON,  
Attorney-in-Fact.

Premium on this Bond \$10.00.

State of California,  
County of Sacramento—ss.

On this 18th day of March in the year One Thousand Nine Hundred and Forty-eight before me, Helen S. Bailey, a Notary Public in and for the said County of Sacramento, residing therein, duly commissioned and sworn, personally appeared S. M. Swanson, known to me to be the Attorney-in-fact of the Standard Accident Insurance Co., the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of Sacramento the day and year in this certificate first above written.

/s/ HELEN S. BAILEY,

Notary Public in and for the County of Sacramento,  
State of California.

My commission expires October 13, 1948.

[Endorsed]: Filed March 19, 1948. [37]

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[Title of District Court and Cause.]

STIPULATION FOR DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

It is hereby stipulated by and between the above named plaintiff, LeRoy Cowan, and the above named

defendant, Young Iron Works, a corporation, the parties to the appeal taken herein by said plaintiff, that the following parts of the record, proceedings and evidence in the above entitled action are hereby designated to be included in the record on appeal herein, and that when so included, the same shall constitute a complete record for use on said appeal, to wit:

1. The following documents removed from the Superior Court of the State of California, in and for the County of Sacramento, and filed in the above entitled action on January 28, 1947:

- (a) Complaint.
- (b) Order directing service of summons on foreign corporation in manner prescribed by Section 406(a) of the California Civil Code.
- (c) Affidavit for order directing service of process on foreign corporation under Section 406(a) of the California Civil Code.
- (d) Affidavit of Paul J. Isaacson, which is attached to a certain document removed from said Superior Court and entitled "Notice of Special Appearance and Motion to Quash Summons and Service Thereof."
- (e) Petition for removal of cause to United States District Court.
- (f) Order for removal of cause to United States Court.

2. The following documents and records originally filed in the above entitled Court following the



removal of the above action from said Superior Court.

- (a) Notice of motion to quash service of summons.
- (b) Order granting leave to take depositions.
- (c) Depositions (and exhibits attached thereto) of Albert S. Weaver, Jr., and Thomas H. Lynn.
- (d) Opinion and order filed on January 28, 1948.
- (e) Dismissal of action as to defendants First Doe, Second Doe and Third Doe.
- (f) A list of entries in the "Civil Docket."
- (g) Notice of appeal with date of filing thereon.
- (h) Bond on appeal.
- (i) This stipulation of the parties for designation of contents of record on appeal.
- (j) Stipulation and order for transmission of original depositions of Albert S. Weaver, Jr. and Thomas H. Lynn to Appellate Court as part of record on appeal.

ARCHIBALD D. McDOUGALL,  
Attorney for Plaintiff,  
LeRoy Cowan.

JOHNSON, WARE & DAVIES,  
By EDMUND DAVIES,

Attorneys specially appearing for defendant Young  
Iron Works, a corporation.

[Endorsed]: Filed March 30, 1948. [40]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF ORIGINAL DEPOSITIONS OF ALBERT S. WEAVER, JR., AND THOMAS H. LYNN, TO APPELLATE COURT AS PART OF RECORD ON APPEAL

It is hereby stipulated that the original depositions of Albert S. Weaver, Jr., and Thomas H. Lynn on file in the above-entitled action may be sent by the Clerk of the above-entitled Court to the Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal herein, in lieu of a copy thereof, and that upon completion of the printed record in accordance with Rule 19 of Rules of the United States Circuit Court of Appeals for the Ninth Circuit, said original depositions may be returned to the above-entitled Court.

ARCHIBALD D. McDOUGALL,  
Attorney for Plaintiff.

JOHNSON, WARE & DAVIES.  
By EDMUND DAVIES,  
Attorneys for Defendant, Young Iron Works, a  
Corporation, Appearing Specially. [41]

Order

Pursuant to the foregoing stipulation, it is hereby ordered that the original depositions referred to in the foregoing stipulation may be sent by the Clerk

of the above-entitled Court to the Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal herein in lieu of a copy thereof, and that said depositions shall be returned to the above-entitled Court upon completion of the printing of said record on said appeal.

DAL M. LEMMON,

Judge of the District Court.

[Endorsed]: Filed Mar. 31, 1948. [42]

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**CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT, TO RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing pages, numbered 1 to 42, inclusive, contain a full, true and correct transcript of certain records, and proceedings in the case of LeRoy Cowan vs. Young Iron Works, a corporation, No. 5870, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Stipulation for Designation of Contents of Record on Appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Four and 70/100 (\$4.70), and that the same has been paid to me by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 20th day of April, A.D. 1948.

[Seal] C. W. CALBREATH,  
Clerk.

By /s/ F. M. LAMPERT,  
Deputy Clerk. [43]

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United States District Court for the Northern  
District of California, Northern Division

No. 5870

LeROY COWAN,

Plaintiff,

vs.

YOUNG IRON WORKS, a Corporation, FIRST  
DOE, SECOND DOE and THIRD DOE,  
Defendants.

Wednesday, August 27, 1947

Depositions of Albert S. Weaver, Jr., and Thomas  
H. Lynn, witnesses produced on behalf of plain-  
tiff, taken before Elma A. Pipher, a Notary  
Public in and for the County of Sacramento,  
State of California.

Appearances:

For the Plaintiff: Archibald D. McDougall, Esq.,  
California State Life Building, Sacramento, Cali-  
fornia; Lloyd G. Buchler, Esq., Capital National  
Bank Building, Sacramento, California.

Counsel Specially Appearing for Defendant Young Iron Works: Johnson, Ware & Davies, by Edmund Davies, Esq., California State Life Building, Sacramento, California. [1\*]

## NOTICE OF TIME AND PLACE OF TAKING DEPOSITIONS

To the Above-Named Defendant, Young Iron Works, a corporation, and to its attorneys, Gerald R. Johnson, and Johnson, Ware and Davies:

You and each of you will please take notice that LeRoy Cowan, the plaintiff in the above-entitled action, will take the depositions of Thomas H. Lynn, Sacramento, California, and Albert S. Weaver, Jr., Sacramento, California, before Elma A. Pipher, a Notary Public in and for the County of Sacramento, State of California, at Room 710, California State Life Building, Sacramento, California, on the 27th day of August, 1947, at the hour of 10:00 o'clock a.m., and that said depositions will be taken for the purpose of obtaining testimony for use in opposition to the motion filed herein by said defendant for an order to quash service of summons herein.

You are hereby further notified that said witnesses, Thomas H. Lynn, and Albert S. Weaver, Jr., will be required to bring and produce at the time and place of the taking of the said deposition all of the records, statements of account, agreements,

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.



contracts, and other documents in the possession of Weaver Tractor Company, located at 19th and "T" Streets, Sacramento, California, showing the arrangement under which said Weaver Tractor Company handles the distribution and sale of articles manufactured by said defendant Young Iron Works, the [2] volume of business done in connection therewith, and the relationship existing between said Weaver Tractor Company and said defendant Young Iron Works, together with a copy of all catalogues furnished said Weaver Tractor Company by said Young Iron Works, setting forth the various kinds of mechanical appliances manufactured by said Young Iron Works, and sold to the public generally.

Dated this 19th day of August, 1947.

/s/ ARCHIBALD D. McDOUGALL,  
Attorney for Plaintiff,  
LeRoy Cowan.

### Affidavit of Service

State of California,

County of Sacramento—ss.

Harold T. King, being first duly sworn, deposes and says:

That he is and was at the time of the service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within-entitled action; that on the 19th day of August, 1947, he [3] personally

served a copy of the foregoing Notice of Time and Place of Taking Depositions on Edmund Davies, attorney for the above-named defendants, by delivering to and leaving with the said Edmund Davies, at his office in Suite 1100, California State Life Building, a copy of the said notice.

HAROLD T. KING.

Subscribed and sworn to before me this 19th day of August, 1947.

LLOYD BUCHLER,

Notary Public in and for the County of Sacramento, State of California. [4]

[Title of District Court and Cause.]

State of California,

County of Sacramento—ss.

I, Elma A. Pipher, hereby certify that I am an official phonographic reporter of the Superior Court of the State of California, in and for the County of Sacramento, and a competent phonographic writer; that I am a Notary Public in and for the County of Sacramento, State of California, and that I am not related to nor connected with any of the parties to the above-entitled action nor their counsel, and am not in any manner interested in the event of said action.

That pursuant to written notice to take deposition, subpoena and affidavit of service in support thereof, filed with the United States District Court for the Northern District of California, Northern Division, a copy of which is hereto attached and

made a part of this certificate, upon this Wednesday, the twenty-seventh day of August, 1947, at the hour of 10:00 o'clock in the morning of said day, at Room 710, California State Life Building, Sacramento, California, personally appeared before me Albert S. Weaver, Jr., and Thomas H. Lynn, witnesses produced and whose depositions were noticed to be taken on behalf of plaintiff in the above-entitled action; also appeared Archibald D. McDougall, Esq., and Lloyd G. Buchler, [5] Esq., counsel on behalf of plaintiff; also appeared Edmund Davies, Esq., of counsel specially appearing for defendant Young Iron Works in said action.

Pursuant to said written notice, a copy of which is hereto annexed and made a part of this certificate, the said witnesses, Albert S. Weaver, Jr., and Thomas H. Lynn, were by me first duly and regularly sworn to testify the truth, the whole truth and nothing but the truth in the matter of their said depositions, and the taking thereof then proceeded, upon direct examination, conducted by Archibald D. McDougall, Esq., of counsel on behalf of said plaintiff, and cross-examination conducted by Edmund Davies, Esq., of counsel specially appearing for defendant Young Iron Works.

That said depositions, including all questions propounded to and answers given by said witnesses, all objections of counsel in respect of questions propounded, all motions of counsel in respect of testimony given, and all matters incident to the taking of said depositions were by me taken down in phonographic writing, and I thereafter caused my said

phonographic writing to be transcribed into long-hand typewriting for submission to the said witnesses for their perusal, correction and signature.

That said transcription is a true and correct record, and is in the words and figures following, to wit:

Mr. Davies: Before the witness is sworn, Mrs. Pipher, I would like to say for the record that we are appearing specially for the Young Iron Works, who have filed a motion to quash service with summons. That special appearance is being made now, and we reserve at this time and throughout the taking of Mr. Weaver's deposition as well as that of Mr. Lynn. I also want to state for the purpose of the record that we are appearing specially in this matter, pursuant to notice of the taking of the depositions of Mr. Weaver and Mr. Lynn, which notice was [6] made pursuant to an order of the Federal Court permitting the taking of the depositions in connection only with the motion that I have just referred to.

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Testimony of

ALBERT S. WEAVER, JR.

witness produced on behalf of plaintiff herein; sworn.

Direct Examination

By Archibald D. McDougall, Esq., of counsel on behalf of plaintiff:

Q. Your name in full is Albert S. Weaver, Jr., is it not?      A. Yes.

Q. Where do you reside, Mr. Weaver?



(Deposition of Albert S. Weaver, Jr.)

A. 1445 Forty-fifth Street, Sacramento.

Q. What is your business?

A. Tractor dealer.

Q. Are you connected with Weaver Tractor Company?      A. Yes.

Q. Is Weaver Tractor Company a corporation?

A. Yes.

Q. And what is your official capacity?

A. President.

Q. And as president are you personally familiar with the various ramifications of the business of the Weaver Tractor Company?      A. Fairly so.

Q. And where is the place of business of Weaver Tractor Company?      A. 1900 T Street.

Q. How long has it been in business at that address?      A. About six—about seven years.

Q. Does the Weaver Tractor Company have anything to do with products manufactured by Young Iron Works?      A. We sell them.

Q. Young Iron Works is a corporation located in the State of Washington, is it not?

A. We believe so. [7]

Q. I mean there is nothing to the contrary as far as you know in respect to—

A. (Interposing): It is the State of Washington. I believe it is a corporation.

Q. You know it is in Washington?

A. Yes.

Q. Seattle is their place of business, is that correct?      A. Yes.



(Deposition of Albert S. Weaver, Jr.)

Q. What does Weaver Tractor Company do with respect to the handling of Young Iron Works products?

Mr. Davies: I object to any questions relating to what disposition Weaver Tractor Company does with the products that you allege to be that of Young Iron Works. This disposition is being taken for the purpose of showing the nature of the business relationship between Weaver Tractor Company and Young Iron Works.

Mr. McDougall: Is that all?

Mr. Davies: That is all.

Mr. McDougall: Would you read the question to the witness, please, Mrs. Pipher?

(The question was read by the reporter.)

A. (By the Witness): We maintain a stock of them, of their products. As sales are made or the stock is depleted we issue purchase orders from time to time, and they are then shipped to us. We display them and sell them to the trade.

Q. (By Mr. McDougall): In other words, it is true, is it not, that Weaver Tractor Company handles products manufactured by Young Iron Works?

A. Yes.

Q. And generally speaking, what type of products are they?

A. Our end of it is logging rigging. They have other products, I believe.

Q. Now, when you say your end of it is logging and rigging, by that do you mean that your firm

(Deposition of Albert S. Weaver, Jr.)

handles mechanical appliances [8] pertaining to logging and rigging, such as swivel bolts, and various other commodities of that kind?

A. Yes.

Q. Now, how long has Weaver Tractor Company been handling products manufactured by Young Iron Works?

A. In a fairly large way since 1945.

Q. And prior to that time to your personal knowledge was there any other firm in Sacramento handling their products? A. Yes.

Q. What firm was it?

A. Capital Tractor.

Q. And were they handling Young Iron Works products as far as you know along the same lines as you now are handling them?

A. I believe so.

Q. Under the same arrangement as you now dispose of them, is that right? A. Yes, sir.

Mr. Davies: That is, if you know.

Mr. McDougall: I am merely asking of your own knowledge.

Witness: Oh, I do not know what their deal was with Young, but I presume it was the same as ours.

Q. (By Mr. McDougall): Now, can you tell me, Mr. Weaver, how it came about that Weaver Tractor Company commenced handling the products manufactured by Young Iron Works?

A. There is a logging congress which has a meeting of all the loggers and suppliers. That takes place once a year. One of our men was up there, saw

(Deposition of Albert S. Weaver, Jr.)

the Young display, and entered into negotiations so that we handled their account.

Q. Now, do you personally happen to be familiar with the arrangement under which you handle their account in California?

A. Yes, I think so.

Q. Will you tell me what it is?

A. We have what we call an exclusive arrangement for the Sacramento trade area, which they market through no people other [9] than ours. We buy it from them, sell it to the trade, and that is about it. There is a rather complicated discount procedure, and I don't know what the exact discounts are at the present time.

Q. Now, you mention an exclusive, or rather an arrangement for the exclusive handling of their products in the Sacramento area. What do you mean by that, Mr. Weaver?

A. That if a competitor or a user of their products that lived in this trade area, which is roughly the Sacramento Valley, sent an order in to Young Iron Works, it would be referred to us to be filled.

Q. By that you mean that the only concern in the Sacramento area, which comprises, we will say, the Sacramento Valley, from whom officially in this area could be purchased Young Iron Works products would be the Weaver Tractor Company?

A. The Sacramento Valley is too large an area, but otherwise it is correct.

Q. Can you give me a little more restricted definition of the area, that is by counties? Do you hap-

(Deposition of Albert S. Weaver, Jr.)

pen to know offhand what counties you think this exclusive arrangement is over?

A. It is pretty loose. I think this will illustrate your point: When this started, Stockton was presumed to be part of the Sacramento trade area. Some places they asked us if we objected to their appointing a dealer in Stockton. We said no, we couldn't handle it that far to the south, and probably around the Grass Valley area, which at the present time is the northern boundary.

Q. Well, how far north would you go?

A. About Grass Valley.

Q. That would be generally speaking the Nevada County, Sacramento County, Yolo County—

A. Yes, Eldorado, Amador.

Q. Eldorado and Amador Counties?

A. Yuba. [10]

Q. And within that particular area then it is true, is it not, Mr. Weaver, that the only concern that is handling Young Iron Works products is the Weaver Tractor Company, of which you are president?

A. Yes, as far as its logging hardware, yes, yes.

Q. And if any consumer desires to purchase any of the Young Iron Works products, that is necessary, under your arrangement with the Young Iron Works, for the consumer to purchase the product from your firm? A. Weaver Tractor Company.

Mr. Davies: We object to the question on the grounds it is calling for an answer that has to do with the relationship dealings between the Weaver



(Deposition of Albert S. Weaver, Jr.)

Tractor Company and Young Iron Works, and that is not the question involved.

Mr. McDougall: Would you read the question, Mrs. Pipher?

(The question was read by the reporter.)

A. (By the Witness): No. He can go to other dealers, Stockton, Grass Valley, Redding.

Q. (By Mr. McDougall): I am referring to purchasing in the area over which you have the exclusive agency. A. Yes.

Q. In other words, your answer would be yes to my previous question?

A. If he buys it here.

Q. That is what I am getting at. And that was the understanding that you had with Young Iron Works when you started handling their products in this area? A. Yes.

Q. And has that arrangement been in existence since the year 1945 when you started handling their products? A. Yes, sir.

Q. Do you happen to have any correspondence or memoranda or agreement with reference to your arrangement, Mr. Weaver? A. Yes.

Q. May I see what you have in that regard?

A. (Presenting Letter to Mr. McDougall): That is the original letter [11] from Grady.

Q. And to identify Mr. Grady, he is connected with Weaver Tractor Company?

A. He is our logging salesman, yes.

Q. Now, have you other correspondence beside this?



(Deposition of Albert S. Weaver, Jr.)

A. (Presenting letter to Mr. McDougall.)

Q. Now, you have shown me, Mr. Weaver, a letter dated January 18, 1945, addressed by Weaver Tractor Company to Young Iron Works, Seattle, Washington. Is this the office copy? A. Yes.

Q. Of that letter? A. Yes.

Q. And the original was deposited in the mail and sent to Young Iron Works? A. Yes.

Mr. McDougall: We offer this letter in evidence and ask to have the same marked as Plaintiff's Exhibit 1 in connection with this deposition.

Mr. Davies: We object to the offer upon the ground the proper foundation has not been laid.

(The paper to which reference last is made was marked Plaintiff's Exhibit 1 and is hereto attached and made a part of this deposition.)

Q. (By Mr. McDougall): Does this letter come from the files of Weaver Tractor Company?

A. Yes.

Q. And did you procure it from the files?

A. Yes, our office.

Q. Of the Weaver Tractor Company?

A. I did, yes.

Mr. McDougall: It will probably expedite the matter if I read these as we proceed. Letter dated January 18, 1945, addressed to Young Iron Works, Seattle, Washington:

"Gentlemen: During my recent trip to the Logging Congress, I called upon the Interstate Tractor Co. in Portland, Oregon, and was very much impressed by your line of logging blocks, butt hooks, clevises and so forth.

(Deposition of Albert S. Weaver, Jr.)

“We carry a rather extensive line of logging supplies in Sacramento and service the pine area in this region, and in the past have enjoyed a very nice business in this area. However, I [12] believe we could improve our position materially with your line.

“Will you please let us know if you are in the position to service us. If such is the case, without any further correspondence from us, will you send us 150 of your catalogues so that we can incorporate them in a loose leaf catalogue that we will put out for distribution to the logging industry throughout this area.

“Yours very truly, Weaver Tractor Company, Frank B. Grady.”

Q. (By Mr. McDougall): Now, Mr. Weaver, who is Frank B. Grady?

A. He is our logging salesman.

Q. And at the time this letter was written on January 18, 1945, was he connected with Weaver Tractor Company?

A. In that capacity, yes.

Q. As a logging salesman? A. Yes.

Q. And he is the gentleman that wrote this letter, is that correct?

Mr. Davies: We will make the same objection upon the ground that the proper foundation has not been laid.

Q. (By Mr. McDougall): Now, you have produced, Mr. Weaver, a letter from Young Iron Works, dated January 24, 1945, addressed to Mr.

(Deposition of Albert S. Weaver, Jr.)

Frank B. Grady, Weaver Tractor Co., 1900 T Street, Sacramento, California. Was that letter received by Weaver Tractor Company?

A. Yes.

Q. And that is the original of the letter, is it?

A. Yes.

Q. And that letter was obtained by you from your files, that is Weaver Tractor Company files, for the purpose of having same produced at this deposition, was it not? A. Yes.

Mr. McDougall: We offer this letter in evidence and desire to have the same marked as Plaintiff's Exhibit next in order.

Mr. Davies: We make the objection that the proper foundation has not been laid.

(The paper to which reference last is made was marked Plaintiff's Exhibit 2, and is hereto attached and made a part of this deposition.)

Mr. McDougall: The letter reads as follows: This is on the [13] letterhead of Young Iron Works, dated January 24, 1945, addressed to Mr. Frank B. Grady, Weaver Tractor Co., 1900 T Street, Sacramento, California:

"Dear Mr. Grady: We wish to thank you very kindly for your letter of January eighteenth and contents noted. We are only sorry that the writer did not have the opportunity to make your acquaintance at Seaside, Oregon. However, we are glad that you stopped at the Interstate in Portland and saw the job that they are doing for us in Oregon.

(Deposition of Albert S. Weaver, Jr.)

"We wish to advise you that we are very much interested in having you as our representative in your territory for our line of blocks, tools and manganese hooks. Under separate cover we are sending you one of our new catalogues. We also wish to advise that in the next few days we will have our new circular out on our line of new manganese butt hooks and choker hooks, as well as butt rigging.

"You ask in your letter if we are in a position to take care of you, and we wish to advise you that we are. You will note that the catalogue we are sending you is bound, and as you mentioned that you wanted catalogues for a loose leaf binder, please let us know if you want us to send you 150 more of these.

"Also enclosed herewith is one of our discount sheets for distributors. Its prices are f.o.b. Seattle.

"For your information we wish to advise you that we have had a tentative arrangement with the Capitol Tractor and Equipment Company, but we are canceling them out as of today.

"The writer will be anxious to call on you the first time he gets down in your territory.

"Thanking you very kindly, we wish to remain very truly yours, Young Iron Works."

(Deposition of Albert S. Weaver, Jr.)

Signed in ink, "Paul Isaacson," and then signed in type, "Paul Isaacson, President."

Q. (By Mr. McDougall): Now, Mr. Weaver, you have also shown me a [14] letter dated January 30, 1945, addressed to Young Iron Works and signed, "A. S. Weaver, Jr."

A. That is correct.

Q. Is that letter written by you personally?

A. No. It is written by Grady and signed by me.

Q. You wrote this letter at the time it was sent out, I take it?      A. Yes.

Q. In other words, it was signed by you after you read it?      A. Yes.

Q. So that you have personal knowledge of this particular letter?      A. Yes.

Mr. McDougall: We offer this letter in evidence as Plaintiff's Exhibit next in order.

Mr. Davies: We object to the admission of this letter upon the ground that the proper foundation has not been laid.

(The paper to which reference last is made was marked Plaintiff's Exhibit 3, and is hereto attached and made a part of this deposition.)

Mr. McDougall: A letter dated Sacramento 5, California, January 30, 1945.

"Young Iron Works, 2959 First Avenue South"—

it is abbreviated—



(Deposition of Albert S. Weaver, Jr.)

“Seattle, Washington. Attention: Mr. Paul Isaacson. Gentlemen: We wish to thank you for your letter of January twenty-fourth, appointing us representative of your line in this territory, and assure you that we will do everything possible to make our relationship very happy and profitable. We would appreciate it if you would send us four additional copies of your very well gotten up catalogue. In addition to these, we would appreciate your sending sufficient material for 125 more catalogs that we can include in our loose leaf binders that we will distribute to the logging, mining, and contracting industries in our area.

“We would also like a like number of your new circular on the manganese butt hooks and choker hooks, and butt rigging. We would also like to have four additional discount sheets.

“Very truly yours, Weaver Tractor Co.” [15]

Typed in, “A. S. Weaver, Jr.”

Q. (By Mr. McDougall): This letter that I have just read, Mr. Weaver, is your office copy, is it?      A. Yes.

Q. And the original was mailed to Young Iron Works, is that right?      A. Yes, sir.

Q. And did you obtain this from your files preliminary to coming to the deposition?

A. Yes.

Mr. McDougall: Did I offer this?

Mr. Davies: Yes, you did.

(Deposition of Albert S. Weaver, Jr.)

Q. (By Mr. McDougall): Now, the next letter you have shown me, Mr. Weaver, is a letter on letterhead of Young Iron Works, dated February 8, 1945, signed "Young Iron Works, by Paul Isaacson," addressed to Weaver Tractor Company. Do you remember receiving this letter from Young Iron Works in response to your letter of January 30, 1945? A. Yes.

Q. Upon receipt of this letter was the same placed in your file, that is the file of the Weaver Tractor Company? A. Yes.

Q. And was it from that file that you obtained same for production at the deposition today?

A. Yes.

Mr. McDougall: We offer this letter in evidence as Plaintiff's Exhibit next in order.

Mr. Davis: We object to the admission of the letter upon the grounds the proper foundation has not been laid.

(The paper to which reference last is made was marked Plaintiff's Exhibit 4, and is hereto attached and made a part of this deposition.)

Mr. McDougall: A letter on the letterhead of Young Iron Works, Seattle, dated February 8, 1945, addressed to Weaver Tractor Company, Sacramento 5, California.

"Attention: A. S. Weaver, Jr. Gentlemen: Wish to thank you very kindly for your letter of January thirtieth in reply to our letter of January twenty-fourth, appointing you as our representative in your territory. From your

(Deposition of Albert S. Weaver, Jr.)

reputation we feel satisfied that you people will do a very good job for us, and that our relationship will be very happy and of [16] mutual benefit.

“We sincerely appreciate the nice order received from you for initial stock and we will do everything to get this out as soon as possible. We may not be able to ship it all at once, and trust it will be satisfactory with you to make partial shipments. Just for your information, we wish to advise you that we are, and have been for the past three or four years, extremely busy with Government contracts; especially with U. S. Maritime, but it is our desire and hope to take care of your requirements satisfactorily, and we hope within the next three or four months that our position will be greatly changed.

“We wish to advise you that we do not have any loose leaf catalogues, but we are sending down to you nine bundles of catalogues, fifteen in each bundle, and you can have the covers taken off, and the sheets punched to fit your loose leaf binder.

“Enclosed herewith are four additional discount sheets, also with the catalogues we will send you approximately 250 folders on our new silver lined manganese choker and butt hooks. You can have your name stamped on them as distributors. We are making up the necessary rigging for manganese butt rigging, and will have this information to you very shortly.

(Deposition of Albert S. Weaver, Jr.)

"We assure you of our 100 per cent cooperation, and please do not hesitate to call upon us at any time.

"Would it be of any help, and would you think it necessary, to have our field engineer come down and go over the territory with your men? If so, please advise us and we would be pleased to send Mr. Herb Nelson down.

"Thanking you very kindly, we wish to remain, very truly yours, Young Iron Works."

Signed in ink, "Paul Isaacson," and then signed in type, "Paul Isaacson, President."

Q. (By Mr. McDougall): And attached to this letter—by the way—strike that. Mr. Weaver, I note attached to this letter [17] are three sheets, apparently mimeographed. A heading, "Young Iron Works Discount Sheet, Catalog No. 44. Number 4421-A. Effective February 1, 1944." The same heading appearing on all three sheets. Are these sheets that I have just referred to the sheets that were attached to the original letter in the same way received by Weaver Tractor Company?

A. Yes.

Q. And do those three sheets represent the discount sheets referred to in the letter?

A. Yes.

Mr. McDougall: In case my original offer of the letter did not include the discount sheets attached to the letter, I now offer the sheets attached.

Mr. Davies: We object to the admission of the sheets just referred to upon the ground that it is



(Deposition of Albert S. Weaver, Jr.)

irrelevant, incompetent, and immaterial, and that no proper foundation has been laid.

Mr. McDougall: This is off the record. \* \* \* \*

(The three identical papers to which reference last is made were marked Plaintiff's Exhibit 5, collectively, and are hereto attached and made a part of this deposition. The same are in words and figures following, to wit:

“Young Iron Works, Discount Sheet, Catalog No. 44, No. 4421-A. Effective February 1, 1944.

“Block Section, Pages 5 to 49.....30 -20%

“Tool Section:—

Page 52—No. 198 .....12½-20½%

“ 52—No. 117 .....12½-25%

“ 53—No. 256 .....12½-20%

“ 53—No. 250 .....12½-25%

Pages 54 to 57 .....12½-25%

Pages 58 to 61 .....12½-20%

Page 62 .....12½-25%

“ 63 .....12½-20%

Pages 64 to 66 .....12½-25%

Page 67—Ferrules, No. 188 .....12½-20%

“ 67—Babbitting Tools .....12½-25%

“ 68—Nos. 123, 331 and 332 .....12½-20%

“ 68—No. 121 .....12½-25%

“ 69—Entire Page .....12½-20%

“ 70—Entire Page .....12½-25%

“ 71—Nos. 50, 51 and 54 .....12½-25%

“ 71—No. 55 .....12½-20%

“ 72—Nos. 259, 266, 261 .....12½-25%

“ 72—No. 254 .....12½-20%

Pages 73 and 74—Entire Page .....12½-25%

Page 75—Nos. 107 and 111 .....12½-25%

“ 75—No. 67 .....12½-20%

Pages 79 to 84 .....12½-25%

Pages 86 to 89—See Separate Price Lists”)



(Deposition of Albert S. Weaver, Jr.)

Q. (By Mr. McDougall): Now, Mr. Weaver, do the letters that I have read and offered in evidence constitute the only correspondence you have with Young Iron Works with relation to your representing them in this area? A. Yes.

Q. And with respect to the discount sheets attached to the letter of Young Iron Works dated February 8, 1945, are those the discount sheets on the basis of which you thereafter represented Young Iron Works in this area?

A. There have been many changes since that time.

Q. In what respect?

A. Price adjustments and new items in the line, and so forth.

Q. By that you mean, do you not, Mr. Weaver, that the discount percentages have been changed from time to time with respect to [19] various articles; is that right?

A. The percentages and prices and all the figures that are on that sheet have probably been changed considerably.

Q. Then these discount sheets are more or less merely illustrative of the basis upon which you did business at the time you started to represent them?

A. Correct, yes.

Q. And is it true that your same arrangement with reference to representing Young Iron Works in the area you have designated is the same, with the exception that the discounts and the prices have been changed? A. Essentially so.

(Deposition of Albert S. Weaver, Jr.)

Q. That is the only change?

A. (Nods yes.)

Q. So that your arrangement with reference to the manner of your representation has been the same at all times from 1945 up to the present time?

A. Yes.

Q. Now, do you personally know of any verbal discussions or conversations had with any official or representative of the Young Iron Works with reference to the arrangement under which Weaver Tractor Company represented Young Iron Works in the area of the Sacramento Valley?

A. There have been several.

Q. Supplementing these letters?

A. There have been several tying in and more or less clarifying the situation as to small details.

Q. Are you personally familiar with the verbal arrangements?           A. Yes.

Q. Will you tell us when they were consummated and with whom?

A. I can't give you the dates at all, but from time to time their representative would come down through there, and we would discuss the situation.

Q. Just a minute. By "come down through there" you mean come to [20] Sacramento?

A. Come to Sacramento, yes.

Q. To Weaver Tractor Company's place of business?

A. Yes. And we worked out there supplementing the letters the arrangement which I told you before.

(Deposition of Albert S. Weaver, Jr.)

Q. That is with reference to Weaver Tractor Company being the exclusive distributor in this area; is that what you mean? A. Yes.

Q. For the Young Iron Works products?

A. (Nods yes.)

Q. Now, do you happen to have any of the Young Iron Works catalogs? A. Yes.

Q. You have shown me a catalog, Mr. Weaver, bound with a folder, on the outside of which appears the words, "Young—Seattle," and at the bottom, "Young Iron Works, Seattle." By whom were you supplied with this catalog?

A. I believe they came direct from the factory by express.

Q. By "factory" you mean Young Iron Works at Seattle? A. Yes.

Q. Washington—is that correct?

A. Correct.

Q. Is this the current catalog? A. Yes.

Q. And I notice in the correspondence mention is made of catalogs, that is in this correspondence dated 1945. Do you recall whether they sent Weaver Tractor Company catalogs at that time?

A. Yes, they did.

Q. And following that correspondence did Young Iron Works send to Weaver Tractor Company additional catalogs also from time to time?

A. Yes.

Q. The catalogs contain a list of the various types of appliances manufactured by Young Iron Works and the prices, do they not?

A. I don't know about the prices, but——

(Deposition of Albert S. Weaver, Jr.)

Q. Well, I notice that some of the pages I have checked, the [21] prices are shown.

A. Yes, they do.

Q. Now, the prices shown there are the prices to the ultimate consumer, is that correct?

A. I don't know.

Q. Do you recall that from time to time during the last two years Young Iron Works would send down catalogs from time to time?      A. Yes.

Q. That was to keep abreast of the current pricing of their products, is that right?      A. Yes.

Q. And also to include items that might be of new design or manufacture that were not included in previous catalogs, is that right?      A. Yes.

Q. With reference to the catalog, would they send you down a number?

A. I am not familiar with the details of the catalogs.

Q. Do you know how the trade throughout your area is supplied with catalogs?

Mr. Davies: I object to the question upon the ground——

Mr. McDougall: I will strike that and re-frame it.

Mr. Davies: We object to the question—Excuse me.

(The question was read by the reporter.)

Q. (By Mr. McDougall): Do you know, Mr. Weaver, whether or not loggers and consumers of products such as manufactured by Young Iron Works, whether they are supplied with catalogs put out by Young Iron Works?

(Deposition of Albert S. Weaver, Jr.)

Mr. Davies: We object to the question upon the ground it is incompetent, irrelevant and immaterial, and outside the scope of the order authorizing the taking of the examination. This goes to the relationship between Young Iron Works and Weaver Tractor Company.

Mr. McDougall: Will you read the question?

(The question was read by the reporter.)

Witness: We have issued a good many of them.

Q. (By Mr. McDougall): You say "we." You mean Weaver Tractor Company? A. Yes, sir.

Q. And when you say you have issued a good many of them you mean that you have distributed a good many of the Young Iron Works catalogs to loggers and other consumers of Young Iron Works products, is that right? A. Yes.

Mr. Davies: We still object to the question upon the ground it is incompetent, irrelevant and immaterial, and not within the scope of the order authorizing the taking of this deposition.

Q. (By Mr. McDougall): Mr. Weaver, where are these catalogs obtained by Weaver Tractor Company? A. From Young Iron Works.

Q. And can you state how they were obtained? In other words, briefly, what was the arrangement under which you obtained the catalogs?

A. We requested them, and they sent—honored the request.

Q. What is that?

A. We requested them, and they honored the request.



(Deposition of Albert S. Weaver, Jr.)

Q. And sent you down a number for distribution to the trade, is that correct? A. Yes.

Q. And is that more or less of a common occurrence since the time you started representing Young Iron Works up to the present, namely, the obtaining of catalogs from them and giving them to the trade generally? A. Yes.

Q. Do they charge you for the catalogs?

A. I don't know. I think not.

Q. Do you know, personally, Mr. Weaver, whether there have been any occasions when the Young Iron Works sent catalogs to Weaver Tractor Company without any request on the part of Weaver [23] Tractor Company?

A. I don't know.

Q. Now, you mentioned something, Mr. Weaver, about a representative coming down and supplementing the arrangement outlined in those letters that have been introduced in evidence. Do you happen to know who that was?

A. Usually Herb Nelson.

Q. Well, you state usually. Were there instances where some other gentleman from Young Iron Works would come to see Weaver Tractor Company? A. Yes.

Q. Who?

A. One of the Isaacsons. I have forgotten which one it is.

Q. Do you know that of your own knowledge? Do you know what connection the Isaacsons have with the Young Iron Works?

(Deposition of Albert S. Weaver, Jr.)

Mr. Davies: Object to the question upon the ground it is too general, as referring to the Isaacsons only.

Q. (By Mr. McDougall): Do you happen to know whether the gentleman you referred to is named Paul J. Isaacson? A. No.

Q. You don't know whether that is his first name or not? A. No.

Q. Did you meet him personally when he came? A. Yes.

Q. And do you know when the first time was following the making of the arrangement outlined in the letters it was that Mr. Isaacson came to see you in Sacramento?

A. He was only through here once, and I believe it was approximately a year after this exchange of correspondence.

Q. Did he come to Weaver Tractor Company?

A. He stopped, yes.

Q. And did you see him personally?

A. Yes.

Q. Talked to him? A. Yes. [24]

Q. And did your discussion have to do with your arrangement——

Mr. Davies: We object to the question——

Q. (By Mr. McDougall, continuing): ——under which you were representing——

Mr. Davies: We object to the question upon the ground it is irrelevant, incompetent and immaterial. It has not been shown what relationship existed between the Mr. Isaacson referred to and Young Iron Works.

(Deposition of Albert S. Weaver, Jr.)

Q. (By Mr. McDougall): Tell me the discussion you had with him when he came there?

A. Oh, it was just one of these casual sort of things. The gist of it was we liked the Young line, and they liked the sales that we were making of their products, and it was working out quite well with both sides, and everybody was very happy.

Q. Did this Mr. Isaacson that called on you discuss Young Iron Works products?

A. Oh, yes.

Q. Did he inform you that he was representing the Young Iron Works?

Mr. Davies: We make the same objection upon the ground that it has not been shown what Mr. Isaacson's connection was with the Young Iron Works, and what his authority was to make agreements of any sort.

Mr. McDougall: You may answer the question. Will you read it, Mrs. Pipher?

(The question was read by the reporter.)

Witness: I don't recall.

Q. (By Mr. McDougall): Do you remember how it was that you knew he was from the Young Iron Works?

A. The Isaacsons—it is a rather large family—owned the Isaacson Iron Works, and also the Young Iron Works. It is a very close tie-in up there, as we have been led to believe, and [25] it is a very loose arrangement. Any of the Isaacsons seemed to act impartially and completely for both concerns at

(Deposition of Albert S. Weaver, Jr.)

that time. Therefore, we handled the Isaacson Iron Works products, we handled Young products, so we just went over the whole thing in general.

Q. In other words——

Mr. Davies: Excuse me, Mr. McDougall.

Mr. McDougall: Sure.

Mr. Davies: We move the answer go out as being non-responsive and only hearsay, as to matters not within the knowledge of Mr. Weaver.

Q. (By Mr. McDougall): Is it true that during your discussion with him that the Young Iron Works was mentioned? A. Yes.

Q. Now, do you recall any other individual purporting to be from Young Iron Works calling on Weaver Tractor Company, other than this Herb Nelson you spoke of? A. No.

Q. Now, can you give me some idea, Mr. Weaver, of the volume of business done by you in connection with the sale in your area of Young Iron Works products?

A. No. We don't keep our records so that we have our sales of this particular line by years. I can give you purchases made by us from Young by years.

Q. Will you do that?

A. (Reading from paper): 1945, it would be about \$10,715.00. 1946, \$10,647.00. To date in 1947, \$6,052.00.

Q. Now, would you give us the details on how you receive and distribute the Young Iron Works products?

(Deposition of Albert S. Weaver, Jr.)

Mr. Davies: We object to the question in so far as it has to do with the distribution of the products upon the ground that it is not an examination within the scope of the order.

Mr. McDougall: Will you read the question?

(The question was read by the reporter.)

Witness: We issue purchase orders from time to time to Young Iron Works. They ship us the merchandise and bill us on open account.

Q. (By Mr. McDougall): And is there any discount allowed in connection with your purchase from Young?

A. I think they go to us on a net billing.

Q. How often do they bill you?

A. Once a month.

Q. So is it true that purchases so made run during the month, and as a regular thing at the end of the month or beginning of the month they send a billing to you for the amount of the purchases; is that right?

A. Yes.

Q. Now, with reference to this arrangement under which you handle those products, will you state what routine is followed when an ultimate consumer, a customer to whom you have sold Young Iron Works products returns the same to you, claiming that it is faulty or defective?

Mr. Davies: We object to the question upon the grounds heretofore stated, that the question calls for an answer relating to the relationship between the Weaver Tractor Company and the consumers. It is



(Deposition of Albert S. Weaver, Jr.)

irrelevant, incompetent and immaterial in so far as the subject of the present deposition is concerned as specified in the order permitting the taking of it.

Mr. McDougall: Will you read the question and let Mr. Weaver give us the answer?

(The question was read by the reporter.)

Witness: The article is returned to Young, who analyze it, and make such adjustment as they deem in order, and that information received by us we pass back to the customer.

Q. (By Mr. McDougall): Is it true that before the customer is given credit that Young Iron Works has the last say in determining whether the complaint—

A. Yes. [27]

Q. (Continuing): —is justified?

A. Yes.

Q. Now, you mentioned a man by the name of Dick—or is it Herb Nelson?

A. Herb Nelson.

Q. And you know him personally, do you?

A. Yes.

Q. And do you know what his status is?

A. Not officially.

Q. Do you know by whom he is employed?

A. Young Iron Works.

Q. Do you know what name he goes by, that is with reference to his representative capacity for Young?

A. No.

Q. I notice in one of these letters that he is referred to as a field engineer.

A. That could be. He is in the sales department. What his capacity is I don't know.

(Deposition of Albert S. Weaver, Jr.)

Q. Have you ever heard him referred to as a field engineer for the Young Iron Works?

A. Just in that letter.

Q. Well, that is the letter of February 8, where they referred to Mr. Herb Nelson as the field engineer. Now, has he called on your firm?

A. Yes.

Q. At Sacramento? A. Yes.

Q. And do you know how often?

A. Probably about once every six months.

Q. And do you see him personally when he comes? A. Yes, usually.

Q. Do you know what he does when he comes here to see you or your firm?

A. Checks over the stock, discusses some of the features of his line of merchandise, once in a great while rides with our salesmen.

Q. When he rides with your salesmen where does he go? A. Larger logging accounts. [28]

Q. And do you know what he does when he goes to visit those accounts with your salesmen?

Mr. Davies: If you know?

Witness: I never have been with him.

Q. (By Mr. McDougall): Did you ever discuss with him what he did when he visited these accounts? A. Yes.

Q. Will you state what he informed you he did?

Mr. Davies: We object to the question upon the ground it is not shown that any statements made by Mr. Nelson are binding at all upon Young Iron Works.

(Deposition of Albert S. Weaver, Jr.)

Mr. McDougall: You can answer the question, Mr. Weaver.

A. They discussed with the various officials of the logging concern, and advantages in using Young rigging.

Q. And can you give us some idea, Mr. Weaver, of the length of Mr. Nelson's visits to the Sacramento area?

A. Usually they are for a matter of hours.

Q. And are there times when his visits are longer?      A. A day or two.

Q. And would it be during the longer visits that he would make these trips with your salesmen?

A. Yes.

Q. Have you ever been out with Mr. Nelson, away from your place of business, Weaver Tractor Company?      A. No.

Q. Do you know whether he has ever provided any of your salesmen or any of the accounts with which you deal in your area with entertainment of any kind?      A. No.

Q. You don't know that?      A. (Nods no.)

Q. Have you any arrangement with Young Iron Works with reference to advertising your products?

A. No.

Q. I am referring to other than the catalog business.      A. No. [29]

Q. Do you know whether Young Iron Works products are advertised in your area?

A. I imagine through certain trade journals, although I don't know.

(Deposition of Albert S. Weaver, Jr.)

Q. Do you recall ever having observed any of their advertisements in trade journals in your area?

A. Not definitely.

Q. Do you personally know anything at all about their medium of advertising in your area?

A. Most of it—you mean from them?

Q. Yes.           A. No.

Mr. McDougall: I think that is all, Mr. Weaver.

**Cross-Examination**

By Edmund Davies, Esq., of counsel specially appearing for defendant Young Iron Works:

Q. You just stated in your examination that you maintained a stock of the Young Iron Works products. Who does that stock belong to?

A. Weaver Tractor Company.

Q. How did you get it?

A. They filled our purchase requisitions.

Q. Then you made out a requisition or order?

A. Yes.

Q. For this stock?           A. Yes.

Q. And what did you do with the order?

A. Mailed it to them.

Q. And then what did they do?

A. Acknowledged it and sent us the merchandise.

Q. And where was the order sent to?

A. Seattle.

Q. And is that where the merchandise came from?           A. Yes. [30]

Q. And was it billed to you?           A. Yes.

Q. That is to your company?           A. Yes.

(Deposition of Albert S. Weaver, Jr.)

Q. And was it sent on consignment?

A. No.

Q. Was your company billed later for it?

A. Yes.

Q. And that is true of all the merchandise that you have purchased from Young Iron Works?

A. Yes.

Q. Now, in the course of your examination you have frequently used the word "representing" and there has been some mention of representation. What in the trade is meant by representing a manufacturer?

A. Selling his products.

Q. Do you receive any pay from Young Iron Works for any of your activities?

A. No.

Q. You just receive merchandise that you order and pay for, is that correct?

A. Yes.

Q. And when you spoke a while ago about materials that were returned to you, and that you sent them on to Seattle to the Young Iron Works, that they had the last say as to whether a credit would be made, if the Young Iron Works did not give a credit for any material that they thought was faulty, who would suffer the loss?

A. Usually the customer, if there is a loss involved.

Q. And with reference to the visits of Mr. Nelson, he does not take orders from you, does he?

A. No.

Q. Your orders are all by requisition?

A. By requisition.



(Deposition of Albert S. Weaver, Jr.)

Q. And he does not have anything to do with repairing items that are sent down here by his company, does he?      A. No.

Q. And when you mention an exclusive arrangement, to you people in the trade that means that you simply are the only dealers in a particular area who sell products of that manufacturer; is [31] that correct?      A. Yes.

Mr. Davies: That is all.

Mr. McDougall: That is all, Mr. Weaver.

Mr. Davies: One more question, if I might.

Q. Mr. Weaver, the Young Iron Works don't direct you in connection with any of your activities, do they?      A. No.

Q. And you take no orders from them with reference as to how you are conducting your business?

A. No, sir.

Mr. Davies: That is all.

/s/ ALBERT S. WEAVER, JR.

And I Further Certify that the said transcription was by the said witness, Albert S. Weaver, Jr., thereafter read over, corrected and signed and by the said witness declared to be his deposition in the above entitled action.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Sacramento, State of California, this 8th day of September, 1947.

[Seal]      /s/ ELMA A. PIPHER,  
Notary Public in and for the County of Sacramento,  
State of California.

My Commission Expires January 30, 1950. [32]

Mr. Davies: We make the same statement for the record that we made in connection with the testimony of Mr. Weaver, that is that we are appearing specially in connection with a motion to quash service which has heretofore been filed in this matter, and our appearance is also special in connection with a notice of the taking of this deposition under an order of the Court specifying that it is only in connection with the motion to quash that is now on file.

Testimony of

THOMAS H. LYNN

witness produced on behalf of plaintiff; sworn.

Direct Examination

By Archibald D. McDougall, Esq., of counsel on behalf of plaintiff:

Q. Mr. Lynn, where do you reside?

A. Route 6, Box 3330, Sacramento.

Q. What is your business?

A. I am located with the Weaver Tractor Company.

Q. What is your capacity?

A. Assistant sales manager.

Q. How long have you been connected with Weaver Tractor Company?

A. About four and a half years.

Q. Do you know whether or not Weaver Tractor Company handle Young Iron Works products?

A. Yes, they do.

(Deposition of Thomas H. Lynn.)

Q. And do you know how long they have been handling those products?

A. Oh, I would say about two years.

Q. You were here when Mr. Weaver testified, were you not?      A. Yes.

Q. Now, do you have any knowledge of the arrangement under which Weaver Tractor Company handles the Young Iron Works products?

A. Some.

Q. Would you inform us of the information that you yourself know on that subject?

Mr. Davies: We object to the question as it calls for an answer that is purely hearsay. [33]

Witness: We are the retail outlet for their logging supplies in this area.

Q. (By Mr. McDougall): Is there any other firm in this area that handles their products?

A. Not in the——

Mr. Davies: We object to that upon the ground it is incompetent, irrelevant and immaterial, completely outside the scope of the order permitting the taking of this deposition.

Mr. McDougall: You can read the question, Mrs. Pipher, and he can answer it.

(The question was read by the reporter.)

Witness: There is none in the immediate vicinity.

Q. (By Mr. McDougall): And when I refer to area, I mean the area supplied by Weaver Tractor Company.

A. Yes.

(Deposition of Thomas H. Lynn.)

Q. Do you know how it is that Weaver Tractor Company happens to be the only firm in the Sacramento Valley area that handle Young Iron Works products?

Mr. Davies: If you know.

Witness: Well, yes, it is quite customary in the particular line of work that our organization and others of their type follow to not handle anything unless an exclusive is given. It is not good business.

Q. (By Mr. McDougall): When you say, "exclusive is given," what do you mean by that?

A. That we will be the only outlet in a particular described area.

Q. For the manufacturer?

A. For their products, yes.

Q. When you are referring to their products you mean Young Iron Works products?

A. Or any products which we represent.

Q. Do you personally know of any discussion had between any [34] representative of Young Iron Works and Weaver Tractor Company concerning this exclusive arrangement made which is referred to?

A. No, I don't.

Mr. Davies: We object to that question upon the grounds it calls for an answer that is hearsay.

Mr. McDougall: He has answered it. He said he doesn't know.

Mr. Davies: Very well.

Q. (By Mr. McDougall): In other words, you are not personally familiar with it?

A. That is right.

(Deposition of Thomas H. Lynn.)

Q. Have you personally ever had any discussion with any representative of the Young Iron Works concerning the exclusive arrangement under which Weaver Tractor Company handles their products?

A. No.

Q. Do you know any of the officials or any of the representatives of the Young Iron Works?

A. I have met Mr. Nelson, and one of the Isaacsons when they were in Sacramento.

Q. Do you know what Isaacson it was?

A. No, I don't.

Q. Where did you meet Mr. Isaacson?

A. At the Weaver Tractor Company.

Q. And about when was it?

A. Oh, about a year and a half ago.

Q. Were you present during that conversation in which he participated?

A. No, I wasn't.

Q. You weren't there personally?

A. No.

Q. Did you talk to Mr. Isaacson?

A. Yes, when I was introduced to him.

Q. When he was introduced can you state whether the introduction identified him with Young Iron Works in any way?

Mr. Davies: We object to that question as not being proper upon the ground it calls for an answer that is hearsay, and there [35] is no evidence that the Mr. Isaacson to whom he refers has any connection with Young Iron Works, or anything that he said would be binding.

Mr. McDougall: Will you answer the question?

A. Yes. I knew that he was from there.



(Deposition of Thomas H. Lynn.)

Q. How did you know that?

A. When he was introduced I was told that he was visiting from Seattle, and down in connection with the Young Iron Works.

Q. Is that the only time you ever saw him at Weaver Tractor Company?

A. Yes, it is.

Q. Did you ever see anyone else from Young Iron Works at Weaver Tractor Company?

A. Herb Nelson.

Q. Do you know who Herb Nelson is?

A. He is a representative of their sales department.

Q. And have you seen him personally when he comes to Weaver Tractor Company? A. Yes.

Q. Have you talked personally with him?

A. On occasions, yes.

Q. Do you know about how often he comes?

A. Oh, I would say about every six months.

Q. And during the times that you personally have talked to him, can you give us in substance what the nature of your discussion was?

A. Well, primarily,—

Mr. Davies: We object to that as calling for a conversation with some one who purports to be from Young Iron Works, and it is not shown that anything that he said or might say would be binding upon the company.

Mr. McDougall: You may answer.

A. Usually the sales were discussed, the amount of business that we were doing with their line, and that is about the extent of it.

(Deposition of Thomas H. Lynn.)

Q. I take it from your answers that you didn't personally talk [36] to him every time he came?

A. No, that's true.

Q. Would there be occasions when you saw him there but didn't talk to him?

A. I don't recall any.

Q. How did you happen to know that Mr. Herb Nelson was from Young Iron Works?

A. Oh, he was introduced to me as being a sales representative from Young Iron Works.

Q. And during your personal discussions with him was the name Young Iron Works products mentioned?

A. In the discussion regarding sales of their products and others, yes.

Q. Do you know whether any other individual, outside of Mr. Isaacson and Mr. Nelson, has called at Weaver Tractor Company?

A. I don't know of any.

Q. Do you happen to know what the title of Mr. Nelson is?

A. No, I don't. I know that he is a representative of their sales department. Other than that, I couldn't say.

Q. Have you ever taken any trips with him?

A. No.

Q. Do you happen to know, Mr. Lynn, whether Young Iron Works ever ships any of their products to the ultimate consumer direct in the area covered by Weaver Tractor Company?

Mr. Davies: If you know they do.

The Witness: I know they don't.

(Deposition of Thomas H. Lynn.)

Q. (By Mr. McDougall): How do you know that?

A. Perhaps I should amend that. To my knowledge, they don't.

Q. Now, will you amplify that? You were going to.

A. Well, we are the distributor or retail outlet for their products here, and to the best of my knowledge whenever an order or an inquiry is sent to the Young Iron Works in Seattle from the area which we serve, it is referred to us. There is a [37] letter written to the ultimate consumer stating that we are the retail distributor of their products for that area, and that they should contact us regarding purchase of that item, and a carbon copy of the letter is then mailed to us for a follow-up so that we can call on the party.

Q. And as far as you know the ultimate distributor—or the ultimate consumer will then call on Weaver Tractor Company——

A. To the best of my knowledge, yes.

Q. (Continuing): ——to make a purchase of whatever he wants?      A. That is correct.

Mr. McDougall: That is all.

#### Cross-Examination

By Edmund Davies, Esq., of counsel specially appearing for Young Iron Works:

Q. Mr. Lynn, when you refer to having an exclusive sale of products, you mean by that, don't you, that you are merely the only one in this area——

A. That is right.

(Deposition of Thomas H. Lynn.)

Q. (Continuing): —that is handling the products of the particular manufacturer, is that correct—

A. Yes.

Q. (Continuing): —that you sell here?

A. That is correct.

Q. And when you referred to “their products” you meant by that, didn’t you, that they were products manufactured by Young Iron Works, but which belonged to you after you purchased them and sold them?

A. That is correct, yes, sir.

Q. And did Young Iron Works direct you in connection with any of your activities?

A. None whatsoever.

Q. And the stock that you maintain of the products manufactured by Young Iron Works belongs to whom? [38]

A. To the Weaver Tractor Company.

Q. Belongs to the Weaver Tractor Company?

A. That is right.

Q. And as far as you know they maintain no stock of goods in Sacramento from which they fill orders?

A. They do not.

Q. When you want products of Young Iron Works you send an order by mail to Seattle?

A. That is correct.

Q. And they are returned to you?

A. Yes, sir.

Q. And you pay for them?

A. That is correct.

Q. And then they belong to you?

A. Yes.

Mr Davies: That is all.

(Deposition of Thomas H. Lynn.)

Redirect Examination

By Archibald D. McDougall, Esq., of counsel on behalf of plaintiff:

Q. With reference to the payment, Mr. Lynn, can you tell us what the arrangement is, how the amount to be paid by you is fixed?

A. Do you mean from Young Iron Works, when they ship their products?

Q. From Young Iron Works to Weaver Tractor Company.

A. Yes. At the time of shipment we are billed for the item shipped. There is an invoice sent the same day. It goes through our records to be posted and entered when it is received, and the first of the month they send a statement covering their shipments for that month, against which these invoices are checked, and they are paid at that time.

Q. Now, there has been a letter introduced in evidence, annexed to which are some discount sheets. Can you give us what the situation is concerning the allowance of discount in fixing the amount you pay?

Mr. Davies: We object to that as being incompetent, irrelevant and immaterial. [39]

Witness: I am not too familiar with the discount schedules. I believe they are billed to us at a net figure. I think that the discount basis is taken into consideration by the Young Iron Works at the time that we are billed.



(Deposition of Thomas H. Lynn.)

Q. (By Mr. McDougall): By that you mean that the Young Iron Works makes the allowance of the discount when they bill you?

A. I believe that is correct.

Q. And they bill you for the net after the discount has been deducted? A. That is correct.

Q. And do the discounts vary, different percentages, in other words, for different appliances?

A. I really couldn't say.

Mr. McDougall: That is all. And in case I overlooked it, I desire to offer in evidence this catalog of Young Iron Works that was identified during the testimony of Mr. Weaver.

Mr. Davies: We object to the admission of the catalog upon the ground the proper foundation has not been laid.

/s/ THOMAS H. LYNN.

And I further certify that the said transcription was by the said witness, Thomas H. Lynn, thereafter read over, corrected and signed, and by the said witness declared to be his deposition in the above entitled action.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Sacramento, State of California, this 6th day of September, 1947.

[Seal] /s/ ELMA A. PIPHER,  
Notary Public in and for the County of Sacramento, State of California.

My Commission expires January 30, 1950. [40]

## PLAINTIFF'S EXHIBIT No. 1

January 18, 1945.

Young Iron Works  
Seattle, Washington

Gentlemen:

During my recent trip to the Logging Congress, I called upon the Interstate Tractor Co. in Portland, Oregon, and was very much impressed by your line of logging blocks, butt hooks, clevises and so forth.

We carry a rather extensive line of logging supplies in Sacramento, and service the pine area in this region, and in the past have enjoyed a very nice business in this area. However, I believe we could improve our position materially with your line.

Will you please let us know if you are in the position to service us. If such is the case, without any further correspondence from us, will you send us one-hundred and fifty (150) of your catalogues so that we can incorporate them in a loose leaf catalogue that we will put out for distribution to the logging industry throughout this area.

Yours very truly,

WEAVER TRACTOR  
COMPANY.

FRANK B. GRADY.

FBG/mja

PAUL J. ISAACSON  
PRESIDENT

A. E. HANSEN  
VICE-PRESIDENT

F. THED. ISAACSON  
SECRETARY

# YOUNG IRON WORKS

ESTABLISHED 1902

2959 1ST. AVE. SO.  
SENECA 1071

TIMKEN ROLLER BEARING BLOCKS  
LOGGING EQUIPMENT

CABLE ADDRESS  
"YOUNG"

SEATTLE  
January 24, 1945

Mr. Frank B. Grady  
Weaver Tractor Co.  
1900 T. Street  
Sacramento, California

Dear Mr. Grady:

We wish to thank you very kindly for your letter of January 18th, and contents noted. We are only sorry that the writer did not have the opportunity to make your acquaintance at Seaside, Oregon. However, we are glad that you stopped at the Interstate in Portland and saw the job that they are doing for us in Oregon.

We wish to advise you that we are very much interested in having you as our representative in your territory for our line of blocks, tools and manganese hooks. Under separate cover we are sending you one of our new catalogues. We also wish to advise that in the next few days we will have our new circular out on our line of new manganese butt hooks and choker hooks, as well as butt rigging.

3 additional  
and catalogues  
to be sent

yes →

You ask in your letter if we are in a position to take care of you, and we wish to advise you that we are. You will note that the catalogue we are sending you is bound, and as you mentioned that you wanted catalogues for a loose leaf binder, please let us know if you want us to send you 150 more of these.

150 without cover or binding

3 additional  
discount sheets  
for Grady

Also enclosed herewith is one of our discount sheets for distributors. Its prices are f.o.b. Seattle.

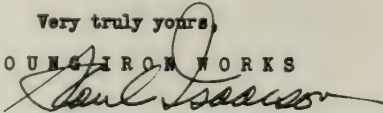
For your information we wish to advise you that we have had a tentative arrangement with the Capitol Tractor and Equipment Company, but we are canceling them out as of today.

The writer will be anxious to call on you the first time he gets down in your territory.

Thanking you very kindly, we wish to remain

Very truly yours,

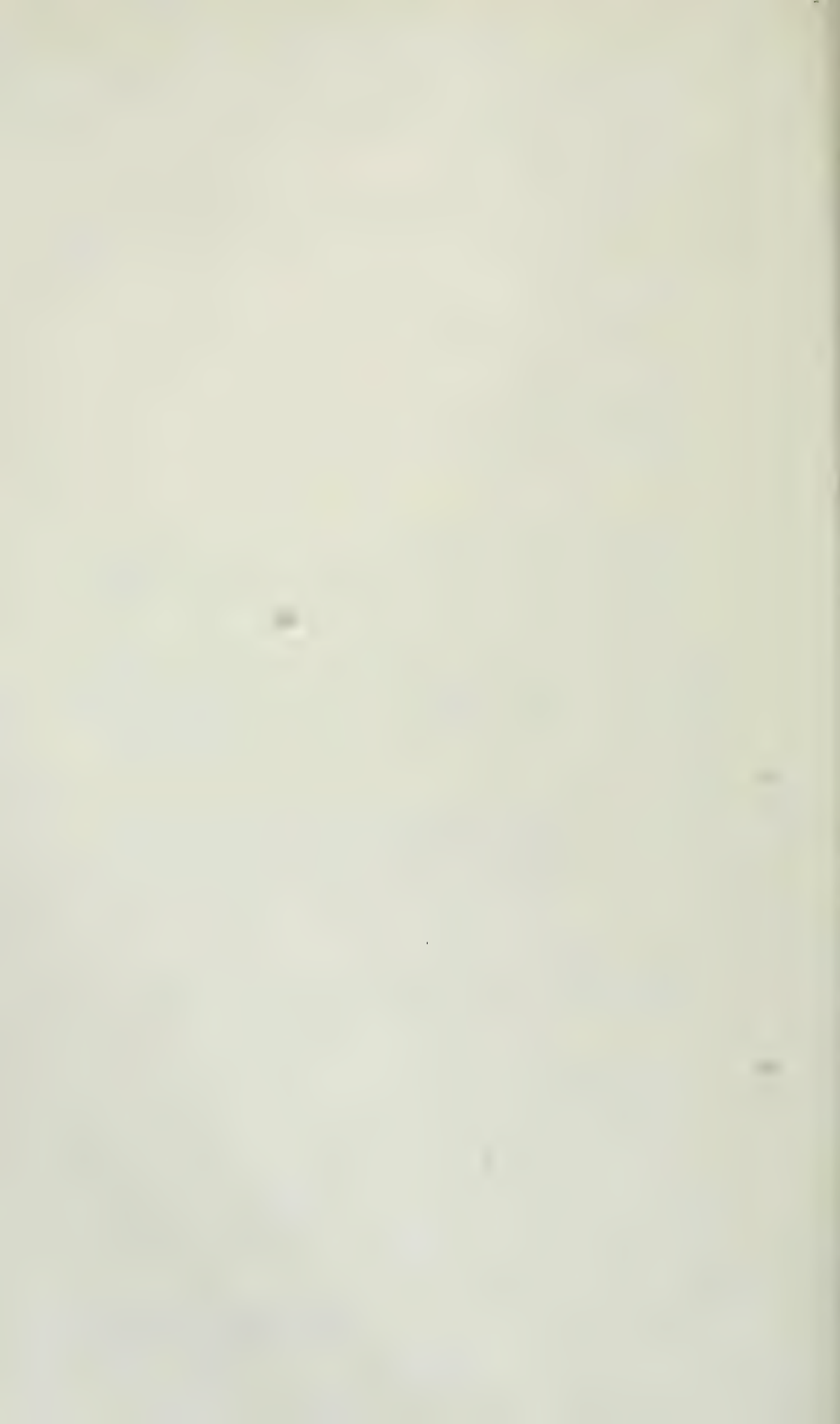
YOUNG IRON WORKS



PAUL ISAACSON  
President

PI/mc  
encl: 1

Plaintiff's Exhibit 2



PLAINTIFF'S EXHIBIT No. 3

Sacramento 5, California

January 30, 1945

Young Iron Works  
2959 First Avenue So.  
Seattle, Washington

Attention: Mr. Paul Isaacson

Gentlemen:

We wish to thank you for your letter of January 24 appointing us representative of your line in this territory, and assure you that we will do everything possible to make our relationship very happy and profitable.

We would appreciate it if you would send us four additional copies of your very well gotten up catalogue. In addition to these, we would appreciate your sending sufficient material for 125 more catalogues that we can include in our loose leaf binders that we will distribute to the logging, mining, and contracting industries in our area.

We would also like a like number of your new circular on the manganese butt hooks and chooker hooks, and butt rigging. We would also like to have four additional discount sheets.

Very truly yours,

WEAVER TRACTOR CO.

A. S. WEAVER, Jr.

fbg:sh



## PLAINTIFF'S EXHIBIT No. 4

[Letterhead Young Iron Works]

[Stamped]: Received Feb. 9, 1945.

February 8, 1945

Weaver Tractor Company  
Sacramento 5, California

Attention: A. S. Weaver, Jr.

Gentlemen:

Wish to thank you very kindly for your letter of January 30th in reply to our letter of January 24th, appointing you as our representative in your territory. From your reputation we feel satisfied that you people will do a very good job for us, and that our relationship will be very happy and of mutual benefit.

We sincerely appreciate the nice order received from you for initial stock and we will do everything to get this out as soon as possible. We may not be able to ship it all at once, and trust it will be satisfactory with you to make partial shipments. Just for your information, we wish to advise you that we are, and have been for the past three or four years, extremely busy with government contracts; especially with U. S. Maritime, but it is our desire and hope to take care of your requirements satisfactorily, and we hope within the next three or four months that our position will be greatly changed.

We wish to advise you that we do not have any loose leaf catalogues, but we are sending down to

you 9 bundles of catalogues (15 in each bundle) and you can have the covers taken off, and the sheets punched to fit your loose leaf binder.

Enclosed herewith are four additional discount sheets, also with the catalogues we will send you approximately 250 folders on our new silver lined manganese choker and butt hooks. You can have your name stamped on them as distributors. We are making up the necessary rigging for manganese butt rigging, and will have this information to you very shortly.

We assure you of our one hundred per cent cooperation and please do not hesitate to call upon us at any time.

Would it be of any help, and would you think it necessary, to have our field engineer come down and go over the territory with your men? If so, please advise us and we would be pleased to send Mr. Herb Nelson down.

Thanking you very kindly, we wish to remain

Very truly yours,

YOUNG IRON WORKS,  
/s/ PAUL ISAACSON,  
President.

PI/mc

encl: 4

## PLAINTIFF'S EXHIBIT No. 5

Young Iron Works, Discount Sheet, Catalog  
No. 44, No. 4421-A. Effective February 1,  
1944.

Block Section, Pages 5 to 49.....	30	-20%
Tool Section—		
Page 52—No. 198 .....	12½	-20%
“ 52—No. 117 .....	12½	-25%
“ 53—No. 256 .....	12½	-20%
“ 53—No. 250 .....	12½	-25%
Pages 54 to 57 .....	12½	-25%
“ 58 to 61 .....	12½	-20%
Page 62 .....	12½	-25%
“ 63 .....	12½	-20%
Pages 64 to 66 .....	12½	-25%
Page 67—Ferrules, No. 188 .....	12½	-20%
“ 67—Babbitting Tools .....	12½	-25%
“ 68—Nos. 123, 331 and 332 .....	12½	-20%
“ 68—No. 121 .....	12½	-25%
“ 69—Entire Page .....	12½	-20%
“ 70—Entire Page .....	12½	-25%
“ 71—Nos. 50, 51 and 54 .....	12½	-25%
“ 71—No. 55 .....	12½	-20%
“ 72—Nos. 259, 266, 261 .....	12½	-25%
“ 72—No. 254 .....	12½	-20%
Pages 73 and 74—Entire Page .....	12½	-25%
Page 75—Nos. 107 and 111 .....	12½	-25%
“ 75—No. 67 .....	12½	-20%
Pages 79 to 84 .....	12½	-25%
Pages 86 to 89—See Separate Price Lists		

[Endorsed]: No. 11906. United States Circuit of Appeals for the Ninth Circuit. LeRoy Cowan, Appellant, vs. Young Iron Works, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed: April 22, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11906

LeROY COWAN,

Appellant,

vs.

YOUNG IRON WORKS, a corporation,

Respondent.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD FOR CONSIDERATION THEREOF

To the Clerk of the above entitled court:

You are hereby notified that the above named appellant intends to rely on the following point in connection with the appeal herein, to wit:

The trial court erred in granting the motion of the above named respondent to quash service of summons on the ground that said respondent was not doing business in the State of California so as to subject it to the service of process in said state.

and said appellant hereby designates the whole record on appeal herein (including the depositions filed) as necessary for the consideration of said point on appeal above mentioned; and it is requested that the whole of said record be printed.

Dated this 28th day of April, 1948.

/s/ ARCHIBALD D. McDOUGALL,  
Attorney for Appellant.

Receipt of a copy of the foregoing Statement of Points and Designation of Record is hereby admitted this 29th day of April, 1948.

JOHNSON, WARE AND  
DAVIES,

By /s/ EDMUND DAVIES,  
Attorneys for Respondent,  
Specially appearing for  
Respondent.

[Endorsed]: Filed April 30, 1948.



No. 11,906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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LEROY COWAN,

*Appellant,*

vs.

YOUNG IRON WORKS (a corporation),

*Appellee.*

APPELLANT'S OPENING BRIEF.

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ARCHIBALD D. McDOUGALL,

California State Life Building, Sacramento, California,

*Attorney for Appellant.*

FILED

JUL - 1 1940

PAUL P. O'BRIEN



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No. 11,906

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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LEROY COWAN,

*Appellant,*

VS.

YOUNG IRON WORKS (a corporation),

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION OF DISTRICT COURT AND OF THIS COURT TO REVIEW THE ORDER APPEALED FROM.

In the above action, which was commenced by the filing of a complaint on May 29, 1947, in the Superior Court of the State of California in and for the County of Sacramento, plaintiff seeks damages in the sum of \$54,832.22 from defendant by reason of certain personal injuries sustained by plaintiff on August 12, 1946. The action is based on the alleged negligence of defendant which is a corporation engaged in the business of manufacturing logging equipment and appliances, in manufacturing and placing on the market for sale a certain device used in lumbering

operations and known as a swivel bolt, and in consequence of which, while being used by plaintiff's employer, near Georgetown, County of El Dorado, State of California, for the purpose for which it was intended in conducting logging operations, said swivel, because of certain defects therein, burst asunder and caused the load being carried thereby to be precipitated downward and fall upon the head of plaintiff with the result that plaintiff was caused to receive severe injuries to his skull and brain. In plaintiff's complaint, which is set forth commencing on page 2 of the printed record, it is also alleged, in addition to the foregoing facts, that at all times therein referred to the defendant, Young Iron Works, was and still is a corporation, organized and existing under and by virtue of the laws of the State of Washington, and that at all of said times, said defendant was and still is doing business in the State of California.

On June 2, 1947, process in the action was served on said defendant by delivery thereof to the Secretary of State of California in the manner prescribed by Section 406(a) of the California Civil Code. Thereafter, on July 1, 1947, defendant filed a petition in said Superior Court for the removal of the action to the United States District Court for the Northern District of California, Northern Division, on the ground of diversity of citizenship in that plaintiff was a resident of said district and that defendant was a citizen of the State of Washington. The petition for such removal is set forth on page 22 of the printed record. In accordance with this petition an order for

removal was made by the state court on July 1, 1947 (Rec., p. 26), and the record in the cause was thereupon filed in said United States District Court on July 28, 1947. (Rec., p. 38.) Thereafter, on July 29, 1947, defendant filed in said District Court a motion to quash service of summons on the ground defendant was a foreign corporation and was not transacting or carrying on business in the State of California and was consequently not subject to the jurisdiction of any Court, either state or federal, within the State of California. (Rec., p. 27.) After hearing on this motion, an order was made by the District Court on January 29, 1948, ordering that service of summons on said defendant be quashed. (Rec., p. 31.) It is from this order quashing service of summons that the present appeal is taken. (Rec., p. 39.)

The District Court has jurisdiction to entertain the above action on the ground that the matter in controversy exceeded \$3,000.00 and was between citizens of different states (28 U.S.C.A. Sec. 41(1); 28 U.S.C.A. Sec. 71); and this Court has jurisdiction to review the order of the District Court quashing service of summons, such order being a final decision and appealable to this Court within the purview of subdivisions (a) and (d) of Section 225, Title 28 U.S.C.A. (*Rosenberg Bros. v. Curtis Brown Company*, 260 U. S. 516, 67 L. ed. 372; *E. I. Du Pont De Nemours & Co. v. Byrnes*, 101 Fed. (2d) 14.)

**STATEMENT OF THE CASE.**

Defendant, which is a corporation organized under the laws of Washington, is engaged in the business of manufacturing and selling to the general public various mechanical devices such as blocks, tongs, hooks, swivels, sockets, shackles, and clevises. Its plant is located at Seattle, Washington from where orders are filled from stock or there manufactured. Sales are made in California to dealers who handle mining, quarrying, logging and marine equipment.

The device manufactured by defendant known as a swivel is used for the purpose of supporting cables utilized in lifting or pulling heavy loads by means of a derrick, and among other purposes is used in connection with logging operations. On August 12, 1946, plaintiff, while working for the Eldo Lumber Company in connection with logging operations conducted near Georgetown, El Dorado County, California, was severely injured as a result of the bursting asunder of a swivel manufactured by defendant, and which only a short while before had been obtained by plaintiff's employer from defendant by means of an order placed with defendant's dealer located at Sacramento, California, and to whom defendant had given the exclusive privilege of selling defendant's products in the Sacramento area, including the County of El Dorado. In plaintiff's complaint, it is alleged that the breaking of the swivel which caused plaintiff's injury was due to defects existing in the metal thereof which resulted from the carelessness and negligence of defendant in manufacturing said swivel and in failing



to use flawless material therein or to properly forge or weld the same and in failing to properly inspect or test the swivel for defects and tensile strength. It is also alleged that at the time said swivel was manufactured by defendant and delivered by it to its dealer at Sacramento, defendant knew the swivel would be apt to be used by the purchaser thereof from said dealer to support cables utilized in lifting or pulling heavy loads by a derrick in connection with logging operations.

Upon the service of process on defendant through the medium of the Secretary of State of California, in the manner prescribed by Section 406(a) of the California Civil Code, defendant moved to quash service of summons on the ground it was not doing business in California. The motion was supported by an affidavit of defendant's president, Paul J. Isaacson (Rec., p. 18), the substance of which is set forth in the opinion of the District Court (Rec., p. 31), as follows:

“The supporting affidavit states that the defendant corporation is organized under the laws of the State of Washington and that it is engaged in a manufacturing business in that state. It has no stock of goods and maintains no office or place of business in California. The customers of the manufactured products are dealers who handle mining, quarrying, logging and marine equipment, or other users, all of whom place their orders and buy direct for their own accounts. Shipments are made from Washington to California to fill these orders. The corporation has

one salesman who resides in Washington and who visits prospective customers in various western states once or twice a year. No installation, engineering or maintenance service is performed by defendant in California. No sales or transactions are made in this state for the account of the corporation.”

In opposition to the motion to quash, plaintiff, pursuant to leave granted by order of court, took the depositions of Albert S. Weaver, Jr. and Thomas H. Lynn, who were officials of Weaver Tractor Company, a California corporation, and which has been the exclusive dealer of defendant's products in the Sacramento Valley area since 1945. These depositions (commencing at p. 51 of the record) show the following uncontradicted facts, which, along with the other circumstances involved, plaintiff contends are amply sufficient to impel the holding that defendant is doing business in California within the purview and intent of the process statute.

The deposition of Albert S. Weaver, Jr., who was president of Weaver Tractor Company, shows his firm handles the products of defendant pertinent to logging such as swivels, and that such products have been thus handled “in a fairly large way since 1945” prior to which time defendant's products were handled by another Sacramento firm known as “Capital Tractor”. (Rec., p. 54.) The deposition also shows the products of defendant are handled under an arrangement whereby Weaver Tractor Company was accorded the privilege of purchasing such products from defendant

under a rather complicated discount procedure for the purpose of resale (Rec., p. 55), and that this is done by Weaver Tractor Company issuing purchase orders on defendant for merchandise which is shipped and billed monthly on open account on the basis of a billing less the discount. (Rec., pp. 77, 93.) It also appears that under its arrangement with Weaver Tractor Company, defendant agreed that the latter should have the exclusive right to handle defendant's products in the Sacramento Valley trade area, embracing the counties of Sacramento, Nevada, Yolo, El Dorado, Yuba and Amador; that defendant agreed it would not market its products through any other concern in that area; and that if a user of defendant's products in such area sent an order to defendant direct, it would be referred to Weaver Tractor Company to be filled, the latter being the only concern in such area from which defendant's products could be purchased. (Rec., pp. 55, 56, 57.)

In this latter regard, the deposition of Thomas H. Lynn shows:

“Q. Do you happen to know, Mr. Lynn, whether Young Iron Works ever ships any of their products to the ultimate consumer direct in the area covered by Weaver Tractor Company?

Mr. Davies. If you know they do.

The Witness. I know they don't.

Q. (by Mr. McDougall). How do you know that?

A. Perhaps I should amend that. To my knowledge, they don't.

Q. Now, will you amplify that? You were going to.

A. Well, we are the distributor or retail outlet for their products here, and to the best of my knowledge whenever an order or an inquiry is sent to the Young Iron Works in Seattle from the area which we serve, it is referred to us. There is a letter written to the ultimate consumer stating that we are the retail *distributor*\* of their products for that area, and that they should contact us regarding purchase of that item, and a carbon copy of the letter is then mailed to us for a follow-up so that we can call on the party.

Q. And as far as you know the ultimate distributor—or the ultimate consumer will then call on Weaver Tractor Company——

A. To the best of my knowledge, yes.

Q. (continuing). ——to make a purchase of whatever he wants?

A. That is correct.”

(Rec., pp. 89, 90.)

Under the arrangement, it also appears merchandise returned by customers was handled as follows:

“Q. Now, with reference to this arrangement under which you handle those products, will you state what routine is followed when an ultimate consumer, a customer to whom you have sold Young Iron Works products returns the same to you, claiming that it is faulty or defective? \* \* \*

Witness. The article is returned to Young, who analyze it, and make such adjustment as they deem in order, and that information received by us we pass back to the customer.

---

\*Italics herein ours, unless otherwise noted.



Q. (by Mr. McDougall). Is it true that before the customer is given credit that Young Iron Works has the last say in determining whether the complaint——

A. Yes.

Q. (continuing). ——is justified?

A. Yes.”

(Rec., pp. 77, 78.)

“Q. And when you spoke a while ago about materials that were returned to you, and that you sent them on to Seattle to the Young Iron Works, that they had the last say as to whether a credit would be made, if the Young Iron Works did not give a credit for any material that they thought was faulty, who would suffer the loss?

A. Usually the customer, if there is a loss involved.”

(Rec., p. 82.)

When the above-mentioned arrangement was first consummated by defendant with Weaver Tractor Company, Stockton was presumed part of the Sacramento trade area, but defendant asked Weaver Tractor Company if the latter had any objection to defendant appointing a dealer there and was advised it could do so. (Rec., p. 56.) There were also dealers located at Grass Valley and Redding. (Rec., p. 57.)

The depositions also disclose that the above-mentioned arrangement, which has been in existence since 1945 (Rec., p. 57), had its inception in correspondence between Weaver Tractor Company and defendant commencing with January 18, 1945, when the former



wrote defendant making inquiry if the latter would be interested in having Weaver Tractor Company handle its products in the Sacramento area. (Rec., p. 58; and Pltf. Ex. 1, Rec., p. 94.) The president of defendant, Paul J. Isaacson, replied to this letter on January 24, 1945, and among other things stated:

“We wish to advise you that we are very much interested in having you *as our representative* in your territory for our line of blocks, tools and manganese hooks \* \* \*

Also enclosed herewith is one of our discount sheets for *distributors*. Its prices are f.o.b. Seattle.

For your information we wish to advise you that we have had a tentative arrangement with the Capitol Tractor and Equipment Company, but we are canceling them out as of today.

The writer will be anxious to call on you the first time he gets down in your territory.”

(Rec., p. 61; Pltf. Ex. 2, Rec., p. 95.)

Weaver Tractor Company replied to the foregoing letter on January 30, 1945, and stated in part:

“We wish to thank you for your letter of January 24 *appointing us representative of your line in this territory*, and assure you that we will do everything possible to make our relationship very happy and profitable.”

(Rec., p. 63; Pltf. Ex. 3, Rec., p. 97.)

On February 8, 1945, defendant, through its president, Paul J. Isaacson, wrote Weaver Tractor Company replying to the latter's letter of January 30, 1945. Defendant's letter in part reads:

“Wish to thank you very kindly for your letter of January 30th in reply to our letter of January 24th, *appointing you as our representative in your territory.* From your reputation we feel satisfied that you people will do a very good job for us, and that our relationship will be very happy and of mutual benefit. \* \* \*

Enclosed herewith are four additional discount sheets, also with the catalogues we will send you approximately 250 folders on our new silver lined manganese choker and butt hooks. *You can have your name stamped on them as distributors.* \* \* \*

We assure you of our one hundred per cent cooperation and please do not hesitate to call upon us at any time.

Would it be of any help, and would you think it necessary, to have our field engineer come down and go over the territory with your men? If so, please advise us and we would be pleased to send Mr. Herb Nelson down.”

(Rec., pp. 64, 65, 66; Pltf. Ex. 4, Rec., p. 98.)

In addition to the foregoing letters appointing Weaver Tractor Company distributor of defendant's products, it appears defendant's representatives would from time to time come to Weaver Tractor Company's place of business at Sacramento, California, for the purpose of working on and supplementing the arrangement under which the latter represented defendant as its exclusive distributor in the Sacramento Valley area. (Rec., pp. 69, 70.) The representative usually calling was a Mr. Herb Nelson (Rec., p. 73), who was the field engineer of defendant (see Pltf. Ex. 4, Rec., p. 99), but there were instances when a Mr. Isaacson called. (Rec., pp. 73-76; p. 87.)

It also appears from the depositions that defendant furnished Weaver Tractor Company on numerous occasions with catalogues for distribution to the trade (Rec., pp. 70-73); and it likewise appears that the field engineer of defendant, Mr. Herb Nelson, called at the place of business of Weaver Tractor Company at Sacramento, California, about once every six months. (Rec., p. 79.) In that regard the testimony of Mr. Weaver shows:

“Q. Well, that is the letter of February 8, where they referred to Mr. Herb Nelson as the field engineer. Now, has he called on your firm?

A. Yes.

Q. At Sacramento?

A. Yes.

Q. And do you know how often?

A. Probably about once every six months.

Q. And do you see him personally when he comes?

A. Yes, usually.

Q. Do you know what he does when he comes here to see you or your firm?

A. Checks over the stock, discusses some of the features of his line of merchandise, once in a great while rides with our salesmen.

Q. When he rides with your salesmen where does he go?

A. Larger logging accounts.

Q. And do you know what he does when he goes to visit those accounts with your salesmen?

Mr. Davies. If you know?

Witness. I never have been with him.

Q. (by Mr. McDougall). Did you ever discuss with him what he did when he visited these accounts?

A. Yes.

Q. Will you state what he informed you he did?

Mr. Davies. We object to the question upon the ground it is not shown that any statements made by Mr. Nelson are binding at all upon Young Iron Works.

Mr. McDougall. You can answer the question, Mr. Weaver.

A. They discussed with the various officials of the logging concern, *and advantages in using Young rigging.*"

(Rec., pp. 79-80.)

Mr. Lynn, an official of Weaver Tractor Company, stated with respect to discussions taking place when Mr. Herb Nelson called on this firm:

"A. Usually the sales were discussed, the amount of business that we were doing with their line, and that is about the extent of it."

(Rec., p. 88.)

It also appears from the depositions that the arrangement above mentioned under which Weaver Tractor Company had the exclusive privilege of handling the products of defendant in the Sacramento trade area, has been in existence and followed since 1945 (Rec., pp. 57, 69); and that as a result thereof, defendant has realized on a substantial volume of business in the Sacramento trade area on account of merchandise sold through Weaver Tractor Company, the purchases made by Weaver Tractor Company under its discount arrangement with defendant being \$10,-715.00 for 1945; \$10,647.00 for 1946; and \$6,052.00 for



1947, up to the time Weaver's deposition was taken on August 27, 1947. (Rec., p. 76.)

Having made its order quashing service of summons in the instant case on the ground that the foregoing facts do not constitute a sufficient showing that defendant was "doing business" in California, the sole question involved on this appeal is whether the Court erred in that regard and whether the nature of the activities carried on by defendant in California are such as to constitute "doing business in this state" within the purview of subdivision (2) of Section 411 of the California Code of Civil Procedure, which deals exclusively with the matter of service of process on a foreign corporation.

---

#### **SPECIFICATION OF ERROR.**

The order of the District Court quashing service of summons on the basis of the finding that defendant was not "doing business" in California is erroneous in that its decision is based on the outmoded corporate presence theory; in that it failed to take cognizance of the well-recognized distinction between doing business sufficient to make a foreign corporation amenable to service of process and doing business sufficient to subject it to state regulation; and in that it failed to take cognizance of a number of material and uncontradicted facts and misapplied the law to the facts here presented.



**ARGUMENT.****SUMMARY.**

The "corporate presence theory" is no longer the guide post for determining whether a foreign corporation is amenable to process, particularly, where, as here, the cause of action sued on is connected with the activities which establish contacts with the state of the forum so as to make it reasonable and just that the corporation be required to defend an action commenced there; and in such a situation, the matter of amenability to process is not to be judged by the requirements applicable where it is sought to subject a foreign corporation to the licensing or regulatory statutes of a state. Where, as here, a foreign corporation, for the purpose of enhancing the sales of its products in this state and availing itself of a substantial volume of business here, makes exclusive dealer arrangements calling for favorable discounts with business concerns of this state, designates such concerns as its representative and authorizes them to hold themselves out to the general public as distributors of defendant's products, consults with such dealers as to the propriety of appointing other dealers, supplies them with discount sheets, catalogues for distribution to the trade, and sends its representatives into this state for the purpose of discussing and supplementing the distributorship arrangements as well as for the purpose of soliciting business, checking over the stock of dealers, discussing features of defendant's line of merchandise, and visiting accounts

of such dealers in this state for the purpose of pointing out the advantages of using defendant's rigging—all these activities, coupled with the fact that injury has resulted in this state from the negligent manufacture of a product which is sold in this state in consequence of such activities, make it reasonable and just in accordance with our traditional concept of "fair play and substantial justice" that defendant should be subject to service of process in any suit filed in this state on account of such injury.

---

## I.

**THE "CORPORATE PRESENCE THEORY", WHICH WAS ADOPTED AND FOLLOWED BY THE DISTRICT COURT IN MAKING ITS ORDER QUASHING SERVICE OF SUMMONS, IS NOT NOW THE CORRECT RULE FOR DETERMINING WHETHER A FOREIGN CORPORATION IS DOING BUSINESS IN SUCH MANNER AS TO MAKE IT AMENABLE TO SERVICE OF PROCESS.**

From the opinion of the District Court, it would appear the order quashing service of summons is based solely on the theory that it is only where a foreign corporation "is doing business within the state in such manner and to such extent as to warrant the inference that it is present there", that it can be said to be amenable to service of process there. The theory thus adopted and upon which the order was made is no longer the hard and fast rule previously prevailing in the decisions on the matter of what constitutes doing business in a state. Although cited to the District Court, it apparently

overlooked the recent holding in *International Shoe Co. v. Washington, et al.*, 326 U. S. 310, 66 S. Ct. 154, 162, 90 L. ed. 95, which casts aside the "corporate presence theory", as generally understood, as a prerequisite to making a foreign corporation amenable to process. In holding that solicitation of orders by salesmen, was alone an activity sufficient to permit service of process, the court said:

"Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it *such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'* \* \* \*

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, \* \* \* it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against

it in the courts of the state, *is to beg the question to be decided*. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in *Hutchinson v. Chase & Gilbert* (CCA 2d) 45 F2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum *as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.* \* \* \*

'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. \* \* \*

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, *cannot be simply mechanical or quantitative*. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, *is a little more or a little less*. *St. Louis S. W. R. Co. v. Alexander*, *supra*, (227 U. S. 228, 57 L. ed. 489, 33 S. Ct. 245, Ann. Cas. 1915B 77); *International Harvester Co. v. Kentucky*, *supra* (234 U. S. 587, 58 L. ed. 1482, 34 S. Ct. 944). Whether due process is satisfied must depend rather upon the *quality and nature* of the activity in rela-



*tion to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contracts, ties, or relations. Cf. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, supra; Minnesota Commercial Men's Asso. v. Benn, 261 U. S. 140, 67 L. ed. 573, 43 S. Ct. 293.*

*But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."*

The departure from the "corporate presence theory" is also recognized in *Wooster v. Trimont Mfg. Co.* (Mo.), 203 S. W. (2d) 411, where the Court, in reversing an order quashing service of summons in a case involving facts similar to those presented in this case, said at page 413:

"The ruling in the International Harvester Company case and prior rulings of the kind have proceeded under the doctrine of what is termed *presence* in the state, but the recent ruling in *International Shoe Co. v. State of Washington, et al*, 326 U. S. 310, 66 S. Ct. 154, 162, 90 L. ed. 95, 161 A. L. R. 1057, *has been considered a*



*departure from such doctrine and a move to the principle of "‘fair play’ and substantial ‘justice’."* See 34 Calif. Law Rev. 331. The article in the California Law Review is by the Honorable J. P. McBaine, professor of law, University of California, and former dean of the law school of Missouri University. Speaking of *the departure from the presence doctrine*, the article says: "Rejection of the 'presence' theory obviously compelled announcement of a suitable alternative and, as was to be expected, another theory was announced as furnishing a better solution of this perplexing problem. The new theory seemingly is that *the demands of due process are met by the activities of the agent or agents in the forum if it is 'reasonable in the context of our federal system of government, to require the corporation to defend the particular suit which is brought therein.'*"

In the light of these latest expressions on the subject of what is sufficient to constitute doing business so as to make a foreign corporation amenable to process, it is obvious that the District Court erred in basing its order quashing service of summons herein on the superseded doctrine of corporate presence.

## II.

THE DISTRICT COURT OVERLOOKED THE DISTINCTION BETWEEN THE MEANING OF "DOING BUSINESS" AS RELATED TO THE MATTER OF SERVICE OF PROCESS AND THE MATTER OF STATE REGULATION.

At the time the above action was commenced section 411 (2) of the California Code of Civil Procedure provided that "if the suit is against a foreign corporation \* \* \* *doing business in this state*" summons shall be served in the manner provided by section 406 (a) of the Civil Code. Section 406 (a) of said Civil Code authorizes service on the Secretary of State of California, where the foreign corporation to be served, has filed no designation of agent for service of process and where the corporation has no officers in this state. Service of process on defendant in the above action was made by delivery of such process to the Secretary of State in accordance with the provisions of said section.

Section 405 of the California Civil Code provides that "no foreign corporation shall transact *intra-state business*" in California unless it files a copy of its articles with the Secretary of State and a designation of agent for service of process. Section 408 and succeeding sections of said Civil Code provides that a foreign corporation transacting "*intra-state business*" in California without complying with the provisions of law relative to filing a copy of its articles and a designation of agent, shall be subject to various penalties and prohibitions. As will presently be seen, there is a vital difference in a case of this kind between what constitutes "doing busi-

ness" for purposes of process and what constitutes transacting "intrastate business" so as to make a foreign corporation amenable to the regulatory statutes of the Civil Code. The District Court, however, by adverting to the case of *McMillan Process Co. v. Brown*, 33 Cal. App. (2d) 279, 91 Pac. (2d) 613, in support of its statement that "the facts here point no stronger, if as strong, to doing business as those found" in the *McMillan* case "to be inadequate", indicates it must have been confused with relation to the law applicable here on the matter of what constitutes doing business for process purposes, and failed to take cognizance of the fact that a foreign corporation may be doing business in a state so as to make it amenable to service of process, yet not be doing business to such an extent as would entitle a state to impose conditions or restrictions upon the right of a foreign corporation to transact business within a state. It was this latter situation that was dealt with in the *McMillan* case and which is heavily relied on by the District Court in discounting the sufficiency of the facts here presented to show defendant was doing business in this state.

The distinction in a case of this kind between the respective matters of process and state regulation with relation to what constitutes doing business is important, and must be recognized in order to properly decide a question that relates only to the process aspect. This is made crystal clear by the decision of this Court in *Liquid Veneer Corp. v. Smuckler* (9th CCA), 90 Fed. (2d) 196, which has been

adopted as a leading case on the subject throughout the country, and wherein, it is said, at page 202:

“A foreign corporation may be doing business in a state to bring it within the jurisdiction of the court and amenable to its process and yet not obtain a status to be regulated by a state statute or bring it within the statutory provision requiring a license for operation of such foreign corporation.”

Another case squarely in point is *The Thew Shovel Co. v. Superior Court*, 35 Cal. App. (2d) 183, 95 Pac. (2d) 149, where, in dealing with the distinction between the various code sections of California bearing on the matter of service of process on a foreign corporation and on the right of that state to impose regulations on the right to do business there, the Court said, commencing at page 185:

“It (the term ‘doing business’ as used in section 411 of the Code of Civil Procedure) is not, however, to be confused with the same term when used in statutes (section 405 of the Civil Code) having a different purpose or in proceedings involving difference issues. \* \* \* ‘If the question relates to the right to serve process upon the corporation, \* \* \* a different proposition is presented than is presented where it relates to the right and power of the State to impose conditions or restrictions upon the right of a foreign corporation to do business here.’ ”

On page 188, the Court also said:

“It appears that petitioner’s desire not to be involved in intrastate business arose from its



unwillingness to take out a license and to comply with attending tax regulations. Whether it succeeded in legally attaining its object is not necessary to pass upon in this proceeding. Suffice to say that whether the business conducted was interstate or intrastate makes no difference if petitioner was 'doing business' in the State of California within the meaning of that term as used in section 411, Code of Civil Procedure."

Another case, where the distinction above referred to is directly involved and made manifest is *State v. Ford Motor Co.* (S. C.), 38 S. E. (2d) 242. There, the precise question was presented whether, in a suit to enforce statutory penalties for failure of a foreign corporation to comply with regulatory statutes, the activities of such corporation made it amenable to process and also to the liabilities imposed by statute for non-compliance. In holding that the activities of the foreign corporation involved were such as to make it amenable to process under the broadened rule laid down in *International Shoe Co. v. State of Washington*, supra, but were not sufficient to subject the corporation to liability for the penalties sought to be collected, the Court said at page 248:

"The distinction is now well defined, and applicable here, between doing business by a foreign corporation within a state sufficient to subject it to the jurisdiction of the latter's courts, and the doing of intrastate business therein which subjects it to the requirement of domestication and the consequent burdens of state regulation and taxation."



There can be no doubt, therefore, that the District Court was clearly in error in judging the facts of the instant case in the light of decisions involving solely the question of whether the activities of a foreign corporation were sufficient to subject it to matters of statutory regulation only.

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### III.

**THE FACTS OF THE INSTANT CASE ARE SUCH AS TO MAKE IT REASONABLE AND JUST THAT DEFENDANT BE HELD AMENABLE TO PROCESS AND REQUIRED TO DEFEND THE PRESENT ACTION.**

While it is true that prior to the decision of the Supreme Court in *International Shoe Company v. Washington*, supra, there were decisions holding mere solicitation alone was not sufficient to render a foreign corporation amenable to process, there were also cases holding that very little more than "mere solicitation" was required to bring about that result (*Frene v. Louisville Cement Co.*, 134 Fed. (2d) 511). Here, defendant's own affidavit in support of the motion to quash, admits one of its salesmen "visits prospective customers in various western states approximately twice a year to solicit orders", and from the uncontradicted facts contained in the depositions herein, it must be inferred that included in the western states thus visited for purposes of solicitation is California. In addition to such solicitation, however, it appears without contradiction that other activities were carried on by defendant in this state. The

record shows defendants made arrangements with local concerns, which were undoubtedly contractual in nature, and under the terms of which they should have the exclusive privilege of being dealers of defendant's products in particular areas; that these dealers were allowed to purchase merchandise on a discount basis and were specifically designated by defendant "*as our representative*" in the territory assigned; that defendant consulted its dealer in the Sacramento area relative to obtaining consent to the appointment of another dealer in Stockton; that the dealer appointed for the Sacramento area, Weaver Tractor Company, was specifically authorized to stamp its name on catalogues furnished by defendant showing it was acting as a *distributor* of defendant's products; that at least part of the arrangements for the representation of defendant *was made in California* by representatives of defendant coming here for the purpose of supplementing other portions of the arrangement made by mail; that defendant referred all orders for its products coming from the area assigned, to the dealer located therein, with the explanation that such dealer was defendant's distributor for its products in that area; that all products proving defective would be returned for adjustment to defendant, which had the final say as to whether a credit would be given; that dealers were furnished with discount sheets and with catalogues for distribution to the trade; that defendant arranged for its field engineer to call on its dealer in the Sacramento area, at least once each six months, and who,

upon his arrival, would check the stock of the dealer, discuss features of defendant's line of merchandise and also ride with the dealer's salesmen to the larger logging accounts of the dealer for the purpose of discussing the advantage of using defendant's products; and that in consequence of the foregoing activities defendant was able to realize in the Sacramento area alone a volume of business running into approximately \$10,000.00 per year. Under these circumstances, it would seem unquestionable that there is here more than "mere solicitation" and more than merely casual or occasional activities in the fostering of defendant's business in this state, and that even if it were not for the rule enunciated in the *International Shoe Co.* case, defendant should, nevertheless, be considered as doing business in this state so as to make it amenable to process here.

Prior to the *International Shoe Co.* case, there were many decisions holding that the selection of dealers or the creation of distributorships was sufficient to constitute doing business for purposes of process. (*The Thew Shovel Co. v. Superior Court*, 35 Cal. App. (2d) 183, 95 Pac. (2d) 149; *Moore Machinery Co. v. Steward-Warner Corp.*, 27 Fed. Supp. 526; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Bendix Home Appliances v. Radio Accessories Co.*, 129 Fed. (2d) 177, 181; *LaPorte Heinekamp Motor Co. v. Ford Motor Co.*, 24 Fed. (2d) 861; *Carroll Electric Co. v. Freed-Eiseman Radio Corp.*, 50 Fed. (2d) 993; *Vilter Mfg. Co. v. Rolaff*, 110 Fed. (2d) 491).

In the case of the *Thew Shovel Co. v. Superior Court*, 35 Cal. App. (2d) 183, 95 Pac. (2d) 149, the only test for determining whether a foreign corporation is "doing business" in California under section 411 of the Code of Civil Procedure is prescribed at page 185 as follows:

"The term 'doing business' as used in section 411 of the Code of Civil Procedure, means the entry of a corporation into a state other than that wherein it is incorporated for the purpose of transacting *some substantial part of its ordinary business or exercising some of the functions for which it was created.*"

Certainly, the defendant in the instant case made its exclusive distributor agreements with California firms, solicited business here, and sent its agents here solely "for the purpose of transacting some substantial part of its ordinary business or of exercising some of the functions for which it was created"; and, surely, under the circumstances here presented, defendant enjoys the same advantages in selling its products in California, as it would have in the event branch offices were actually maintained by defendant in this state, and it would indeed be an anomaly, if defendant was considered as not doing business in this state merely because it had seized on the device of arranging the sale and distribution of its products in this state through the medium of a number of locally owned firms, each of whom handles defendant's products only because they are given the exclusive right to do so in a designated area and because of a



special discount arrangement made with them by defendant. There is as much reason for holding defendant amenable to process in the present action as existed in the cases cited above, for in each instance, the ultimate object of the manufacturer is the same, namely, the procuring of business in another state by means of a local arrangement and stimulating such business by the rendition of assistance over a period of years by the manufacturer's agents in this state to the local distributors obtaining such business.

Furthermore, there would seem little doubt but that, even under the old rule, the activities of defendant's representatives in this state were certainly such as to constitute a continuous effort to stimulate the sale of its products here. This is indicated not only by defendant's exclusive arrangements with dealers, heretofore referred to, but by its correspondence and by its action in sending its representatives into this state for the purpose of soliciting orders, checking over its dealers' stock, discussing features of its line of merchandise, and making visits upon logging accounts for the purpose of pointing out the advantages of using defendant's products. These latter activities would alone seem sufficient to constitute doing business in this state. A case in point is *Milbank v. Standard Motor Co.*, 132 Cal. App. 67, 22 Pac. (2d) 271, which involves the validity of service of process on a foreign corporation under section 411 of the California Code of Civil Procedure, as it formerly read. There, the point at issue was whether



the foreign corporation was doing business in California by virtue of sending one of its employees into this state to service machinery sold by the manufacturer in interstate commerce. In holding that such service arrangement was alone sufficient to bring the defendant manufacturer within the category of a foreign corporation doing business in California, the court said at page 70:

“Directing our attention to the activities of defendant in this state, we are of the opinion that they were sufficient in character to constitute ‘doing business’ for the purpose of the service of summons. The continuous endeavor to service the engines of customers in order to correct their mechanical defects and increase their efficiency *was a substantial and important branch of its ordinary business*. It is apparent that the maintenance of such a service does not logically fall within the category of a merely casual or incidental activity of defendant. (Cone v. New Britain Machine Co., 20 Fed. (2d) 593, 595; Beach v. Kerr Turbine Co., 243 Fed. 706).”

Obviously, a foreign corporation which sends its representatives into this state to consummate exclusive dealer arrangements, and which, over a period of years, and at least once every six months, sends its field engineer to California for the purpose of checking the stock of its distributors, discussing features of his employer’s merchandise, and riding with the distributor’s salesmen in making visitations upon large logging accounts for the purpose of pointing out the advantages of using products manufac-

tured by the foreign corporation, is engaging in an activity which is as much "a substantial and important branch" of the "ordinary business" of such corporation, as was the servicing activity constituting the basis for the holding in the case just cited.

Regardless of any question which might previously have existed with reference to the foregoing, any doubt in that regard is now laid at rest by the ruling in *International Shoe Co. v. Washington*, supra, and decisions announced subsequent thereto have also definitely recognized the deviation from what might have theretofore been the law on the subject of what constitutes doing business in a state. A case squarely in point, and involving the activities of a foreign corporation in stimulating sales made by dealers to whom defendant's products were sold under a discount arrangement, for resale to the ultimate consumer in specified areas, is *Wooster v. Trimont Mfg. Co.*, 203 S. W. (2d) 411. There, an order quashing service of summons was reversed and the ruling in that regard was based squarely on the principles announced in the case of *International Shoe Co. v. State of Washington*, supra. After recognizing that orders placed by a dealer in Missouri for defendant's products were interstate business in character, but that this alone did not render the defendant immune from process in Missouri, the court said, at page 414:

"In view of the ruling in the *International Shoe Co.* case, we are constrained to the rule that, under the facts here, defendant was doing business in this state to the extent of making it amenable to the process served upon it."

Another case announced since the *International Shoe Co.* case, showing the deviation from the former rule is *Lasky v. Norfolk & W. Ry. Co.*, C.C.A. 6th, 157 Fed. (2d) 674; and still another case to the same effect, and containing an exhaustive discussion and reference to the numerous cases involving dealerships, and involving activities conducted in assisting such dealers in disposing of the products of defendant through the medium of resale, is *State v. Ford Motor Co.* (S. C.), 38 S. E. (2d) 242. This last decision refers to the ruling in the *International Shoe Co.* case, and after analyzing many decisions involving a manufacturer-dealer relationship, held that although the activities of the manufacturer's agents might not constitute the doing of business so as to make the manufacturer amenable to statutory penalties for failure to become domesticated, such manufacturer was, nevertheless, engaged in activities that made it amenable to service of process. In that regard, the court, at page 254, said:

“Appellant's business in South Carolina is interstate in character, according to the evidence, and it cannot be required to domesticate or suffer the statutory penalty for failure thereabout. Infliction of the latter would burden interstate commerce, which the state cannot constitutionally do. Appellant's many dealers in the state are not its agents; they are in intrastate business here, not it. And its traveling representatives are here on occasions ‘servicing’ its warranties, cultivating the interstate business, supervising it and soliciting more, but they make no local sales or collections nor engage otherwise in intra-

state business so far as the record before us shows. *The activities of the itinerant representatives are incidental to the interstate business but they undoubtedly manifest the presence here of the corporation for jurisdictional purposes.*

As noted in the *International Shoe Co.* case, the question here to be decided, namely, whether the activities of defendant make it amenable to process, is not to be determined on the basis of "mechanical or quantitative" criteria. Neither is the effect of such activities to be considered merely in the light of whether they are "a little more or a little less". It would seem, however, that the District Court followed the contrary of these conceptions, rather than giving consideration to the "*quality and nature* of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." Under the ruling in the *International Shoe Co.* case, if the activities carried on by defendant in this state enabled it to enjoy the benefit and protection of the laws of this state, and if the obligation here sued on is connected with those activities, there is no question but that under the new rule, defendant should be required to respond to service of process in this action. Here, there is no question but that the activities of defendant hereinabove enumerated were such as would have entitled defendant to have recourse in the Courts of California to enforce any of its rights arising therefrom, and that defendant has definitely received the benefit and protection of the laws of this state, while carry-



ing on those activities; and it is likewise unquestionable that the liability here sued on is connected with those activities, for plaintiff's injury arose from one of the sales which those activities were definitely calculated to promote. Under these circumstances the following language used in *International Shoe Co.* case is pertinent. Speaking of the activities of the foreign corporation there involved and the use of salesmen to take orders, the court said:

“They resulted in a large volume of interstate business, in the course of which appellant received *the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities.* It is evident that *these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.* Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.”

It is respectfully submitted that the order of the District Court quashing service of summons in the instant case should be reversed.

Dated, Sacramento, California,  
June 24, 1948.

ARCHIBALD D. McDougall,  
*Attorney for Appellant.*



No. 11,906

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

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LEROY COWAN,

*Appellant,*

VS.

YOUNG IRON WORKS (a corporation),

*Appellee.*

BRIEF FOR APPELLEE.

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FILED

AUG 27 1948

PAUL R. GIBBON



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---

**BRIEF FOR APPELLEE.**

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**STATEMENT OF THE CASE.**

This action was commenced in the Superior Court of the State of California in and for the County of Sacramento. Appellant attempted to obtain service upon appellee, a Washington corporation, pursuant to section 411 (2) of the California Code of Civil Procedure which reads as follows:

“411. The summons must be served by delivering a copy thereof as follows:

\* \* \* \* \*

(2) Foreign corporations, etc. If the suit is against a foreign corporation, or a nonresident joint stock company or association doing business in this State; in the manner provided by Section 406a of the Civil Code.”

Upon petition of appellee, the action was removed to the United States District Court for the Northern District of California, Northern Division, by virtue of an order of the Superior Court. (Rec. 26.)

Appellee appeared specially, as it does now, for the sole purpose of challenging the jurisdiction of the Court over appellee and moved to quash the service of summons. (Rec. 27.)

Jurisdiction could only be obtained over appellee if at the time of the attempted service of summons, it was doing business in California as provided by Section 411 of the California Code of Civil Procedure, to which reference has been made above. Therefore it was, and is incumbent, upon appellant to prove that Young Iron Works, a Washington corporation, was present in California or engaged in such activities as to satisfy the California Statute. The Honorable Dal M. Lemmon, United States District Judge, held that appellee was not doing business in California and ordered that service upon appellee be quashed. (Opinion and Order, Rec. 31 to 36, incl.)

The material facts concerning appellee's business are shown in the affidavit of Paul J. Isaacson. (Rec. 18 to 22, incl.) No case has been cited in appellant's brief which holds that the transactions described by Mr. Isaacson constitute doing business in the State of California for the purpose of serving process or otherwise.

The facts stated by Mr. Isaacson in his affidavit (Rec. 18 to 22, incl.) are uncontradicted. They are as follows:

Young Iron Works is a Washington corporation and has no office or place of business or employees, agents or sale organizations of any kind in California. Its only place of business is Seattle, Washington, where it is engaged in the manufacture of various mechanical devices used in the lumber industry. Its products are sold only from Seattle and shipped only from Seattle and the company has no stock of goods or parts in California nor on consignment, nor in storage there. All sales are made in Seattle, Washington. The company has one salesman who visits prospective customers in various western states approximately twice a year. This salesman resides in Seattle, Washington. He has no residence in California and has never established any office or place of business in California. All sales are made from Seattle, Washington, to independent dealers in California. No contracts are made with any dealers, nor does the company have any interest in any California dealership. Orders are generally sent by mail to the Seattle, Washington, office and are accepted and filled from Seattle. Dealers' customers buy direct for their own account. Young Iron Works retains no title or interest of any kind in goods shipped to customers. It furnishes no installation service or repair or maintenance service of any kind in California, or elsewhere. No stock or parts is maintained, in California or elsewhere. The company does no advertising, maintains no exhibits, displays or demonstrations in California. It has no interest in the resale of merchandise bought by independent dealers, nor any collections or proceeds of sales. No sales are made in California for the

account of the corporation or in which it has any interest.

Appellant attempted to meet the burden upon him, through the testimony, by depositions, of Albert S. Weaver, Jr., president of the Weaver Tractor Company (Rec. 51 to 84, incl.), and of Thomas H. Lynn, assistant sales manager of the tractor company. (Rec. 84 to 93, incl.)

The testimony of Mr. Weaver and of Mr. Lynn in no way contradicts the testimony of Mr. Isaacson. In fact, their testimony makes it perfectly clear that Weaver Tractor Company was an independent dealer buying merchandise in interstate commerce from Young Iron Works and many other corporations and that in no respect did the tractor company act in an agency or representative capacity.

The initiation of the dealership of Weaver Tractor Company came about through one of the Weaver employees attending a logging congress in Oregon and there seeing a display of Young merchandise. (Rec. 54, 58.) Weaver then arranged, as a dealer to purchase Young products for exclusive resale in the Sacramento trade area. As Mr. Weaver said (Rec. 55) "We buy it from them, sell it to the trade, and that is about it."

Frequent reference has been made in appellant's brief to the use of the word "representative." Mr. Weaver explained the use of that term in the trade as simply meaning the selling of a manufacturer's products. (Rec. 82.) The reference Mr. Weaver made



concerning an exclusive arrangement simply means that "they are the only dealers in a particular area who sell products of that manufacturer." (Rec. 83.) Mr. Lynn also testified to the same effect and said that reference to "their products" simply meant products manufactured by Young Iron Works, but which belonged to Weaver. (Rec. 90, 91.)

Concerning the single visit of a Mr. Isaacson from Young Iron Works at Seattle, Mr. Weaver said:

"Oh, it was just one of those casual things. The gist of it was we liked the Young line, and they liked the sales that we were making of their products, and it was working out quite well with both sides, and everybody was very happy." (Rec. 75.)

It was also Mr. Weaver's testimony that Mr. Nelson, from appellee's factory at Seattle, visited the Sacramento area about twice a year and that he would stay a day or two but usually for only a matter of hours. (Rec. 80.)

Other facts testified to by Mr. Weaver in his deposition were these: Weaver Tractor Company sent mail orders to Young Iron Works at Seattle for merchandise. The orders were filled by Young in Seattle and were shipped from Seattle. Weaver was then billed for the merchandise. No goods were sent to Weaver on consignment. No orders for merchandise were given to Mr. Nelson, Young's representative. Young Iron Works had nothing at all to do with the business or activities of Weaver. (Rec. 81 to 83, incl.)

The United States District Judge Dal M. Lemmon had before him all of the facts contained in the present record and in his opinion (Rec. 36) said:

“I hold that the facts disclose that defendant did not engage in the regular continued and sustained course of business in California necessary to constitute doing business there. Rather, its activities were casual or occasional.”

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### **ARGUMENT.**

#### **SUMMARY.**

The sole question here is whether the District Court erred in holding that the appellee, a Washington corporation, was not engaged in any activity or activities in the State of California which would constitute “doing business” there within the meaning of subdivision 2 of Section 411 of the California Code of Civil Procedure.

There is no case cited by appellant in his opening brief or that we have been able to find which holds that the course of dealing which can be inferred from any of the evidence in this case constitutes doing business in California for the purpose of subjecting the appellee to the jurisdiction of the California Court. Those cases cited by appellant and to which reference will be made in the following pages, are clearly distinguishable and in all cases fall far short of showing that the interstate character of the business transacted by appellee is the kind or type contemplated by the California Statute. Therefore appel-

lant has found it necessary in his argument, particularly on pages 15 and 16 of his opening brief, to assume factually the very conclusion he wishes this Court to reach.

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## I.

### THE YOUNG IRON WORKS WAS NOT ENGAGED IN ANY ACTIVITY IN CALIFORNIA WHICH GAVE RISE TO THE CLAIMED LIABILITY.

Appellant argues that the “presence within the state” is a discarded doctrine. This is only a play upon words. A corporation can never, in a real sense, be present in a state like an individual is present. It has to act through officers and agents. We submit, however, that even though for valid service of process (a) it is not necessary that the foreign corporation qualify for intrastate business; (b) nor necessary that it be subject to local state regulations, procedures, and licenses; (c) nor that it maintain an office or have a direct, tangible “presence” within the state; (d) nevertheless a corporation has to do something more than manufacture and ship its goods and send catalogs into a state in interstate commerce in order for it to have brought itself within the state or under the protection of the laws of the state to the point where it can be amenable in local Courts to claims of strangers because of alleged defects in an alleged product of the manufacturer where used by a remote purchaser who did no business with appellee anywhere, let alone in the State of California.

We do not find that the case of *International Shoe Company v. State of Washington*, 326 U. S. 310, upon which appellant so heavily relies, supports his position. That was a case where the State of Washington brought suit in the State Court to recover unpaid contributions to the State Unemployment Compensation Fund. The statute under which the suit was brought provides for unemployment compensation for employees, the cost of which is defrayed by contributions required to be made by employers to the State Unemployment Compensation Fund. International Shoe Company appeared specially and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant and that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made, and that appellant was not an employer within the meaning of the statute. However, the appellant employed 11 to 13 salesmen under the supervision and control of the home office at St. Louis and as stated by the Court at page 313 of the opinion:

“These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales.”

The salesmen carried samples and rented permanent sample rooms for exhibiting samples. It was held that the regular and systematic solicitation of orders



in the state by appellant's salesmen resulted in a continuous flow of appellant's product into the state and was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its Courts and that there were additional activities as well.

It should be noted that in that case the salesmen resided in the State of Washington, were permanently engaged in business there as immediate and direct agents of appellant, and received commissions for the sales they made in that state. The activity in which they were employed within the State of Washington gave rise to the liability for the unemployment compensation payments due the State of Washington. At page 320 of the opinion the Court said:

“The obligation which is here sued upon arose out of those very activities,” so that, “It is evident that these operations established sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.”

Based on the facts of the suit, we cannot see that this decision grants any authority to make appellee subject to process in California, where it does a purely interstate business and sells only to independent dealers and distributors who are not agents of the foreign corporation. At pages 316 and 317 of the opinion the Court emphasized that the terms “present” and “presence” are used merely to



“symbolize those activities of the corporation’s agent within the state which the courts will deem to be sufficient to satisfy the demands of due process.”

The Court did not reverse or modify those decisions cited by it on pages 317 and 318 with respect to which the Court at page 317 said:

“Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.”

The language of the Court in the *International Shoe Company* case at page 320 of the opinion is also very significant. There the Court in referring to the standards adopted by it said:

“Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question.”

Appellant cites *Wooster v. Trimont Mfg. Co.* (Mo.), 203 S. W. (2d) 411, particularly with reference at page 413 of the opinion to an article by J. P. McBaine, in the California Law Review (34 California Law Review 331). The appellant can get no comfort out of this article. The author says the result in the *International Shoe Company* case is sound but points out that:

“The liability enforced arose out of the acts done by the Shoe Company in the State of Washington.” (34 California Law Review 340)

and then continuing says:

“An action by a state against a foreign corporation to enforce a liability to contribute to its unemployment fund, where liability to contribute is based upon the salaries or commissions paid its agents engaged in the business of soliciting orders in the state for merchandise to be shipped into the state, would not have produced any difficulty for either the bench or the bar.”

The author at page 336 of the review article says the “presence” theory and the “fair play and substantial justice theory” are both vague and unsatisfactory, and then goes on to say:

“It is suggested that a proper and simpler solution of this important problem is to hold that an appropriate court of a state has jurisdiction of an action against a foreign corporation which arises out of acts done by its agent or agents which create liability or constitute a part of a series of acts which culminate in creating liability, provided due notice of the action is given. The suggested rule, if sound, cannot be condemned as a radical departure from accepted doctrine when it is borne in mind that originally the opinion prevailed that a corporation could only be sued in the state that created it.”

Appellant, at page 19 of his brief, says the facts in *Wooster v. Trimont* (203 S. W. (2d) 411) are

“similar to those presented in this case.” Actually, the facts in that case bear little resemblance to those in the case at bar. That was a suit brought in Missouri by a manufacturer’s agent against the manufacturer, a Massachusetts corporation, to collect commissions. The facts as stated by the Court at page 412 of the opinion are these: The defendant company manufactured pipe tubes and wrenches at its factory in Massachusetts and sold only to the wholesale trade. Plaintiffs were manufacturer’s agents and had an office in St. Louis, Missouri. Plaintiff and defendant entered into a contract in 1919 under which plaintiff was to take orders for the company’s products on a commission basis. The contracts between the parties were renewed at intervals between 1919 and 1943. The company furnished their agent with catalogs, discount sheets, samples, sales data and information concerning the products of competitors. The company employed two men to call on the Missouri trade. The company directed their agent to place the company’s name on the agent’s office door and to put the company’s name in the St. Louis telephone directory and in the St. Louis post office directory. The company permitted the agent to use a letterhead bearing the company name. Many business letters were addressed to the company at the agent’s office in St. Louis. The company name appeared on the building directory. The company held salesmen’s meetings in St. Louis. The agent adjusted complaints for the company and collected accounts. Customers’ orders were addressed to the company at the agent’s address.

We submit that the foregoing facts go considerably beyond anything found in the present case.

There were no acts of Young Iron Works in California giving rise to any claimed liability.

Respondent is naturally interested in the success of its California dealers and the acceptability of its product, BUT respondent does not distribute or promote through agents or in anyway act under the protection of the California law. In the *International Shoe Company* case, the Court said at page 319 of the opinion (326 U. S. 310) that foreign corporations who have the benefit of the protection of state law and government in the course of their activities should be amenable to legal process and to suit in such state, "so far as those obligations arise out of or are connected with the activities" which are carried out under the protection of such state laws.

None of respondent's relationships with its dealers in any one respect or in the aggregate is asserted under the benefit or protection of the laws of California, nor are there any obligations arising here that can be deemed connected with any activities of respondent in the State of California.

Factually, appellant claims injuries arose while he was employed by some logger who in turn bought, either from the dealer or someone else, the device which that dealer in turn had purchased from respondent, a foreign manufacturer. Appellant is utterly remote from any activity or transaction of appellee who has made an interstate sale of goods to a



dealer who purchased in Seattle goods to be shipped to California for resale at the option of the dealer.

Legally, appellant errs in assuming that any foreign corporation, whose manufactured goods are bought by California dealers and resold in California, is in California for purposes of jurisdiction of California Courts because the manufacturer gives the dealer preferential territory, catalogs and ordinary decency in business relationships.

In times past, dozens of criteria have been emphasized by the Courts as sufficient or insufficient, singly or together, to authorize process against a foreign corporation and from time to time, with the development of the economy of the country and innovations and expansion in business methods the attitude of the Courts has changed concerning the relative significance of these criteria; BUT none of the Courts has yet adopted appellant's theory that there is no mark of distinction between when a foreign corporation is amenable to local process and when it is not. The determination is not a matter of what might momentarily seem to be a good idea or the impression of the Court.

The determination as to when the process is valid is still to be based on the facts of the case and these facts have to show in the aggregate such a presence or activities within the state that the foreign corporation can be deemed to have submitted itself to the jurisdiction of that state or had the benefit or sought the use of its laws and protection. True this does not



have to go so far as to qualify the corporation to do intrastate business, but there has to be some direct activity of the foreign manufacturer within the state. Here respondent had no direct activities in the state, kept no stock of goods, serviced no property there, kept no samples there, maintained no office there, had no staff or employees there, no commission agent or salesman even lived within the state, and all business was handled in and out of Seattle exclusively.

At the most, respondent afforded its dealers in California preferential or "exclusive" treatment in their own geographical area, supplied them with some literature and occasional counsel and suggestions. The products of respondent are sold in California solely and exclusively as the direct and sole sales of such dealers or other owners of those products as may have the same.

Even if appellant was injured by the breaking of a swivel manufactured by appellee, the cause of action, if any, did not arise out of any of the activities of appellee in the State of California. As Mr. Weaver testified (Rec. 81), the manufactured product of Young was bought on requisition mailed to Seattle where the product was manufactured. The goods were then shipped in interstate commerce to Weaver Tractor Company at Sacramento and the tractor company was then billed through the mail. Weaver Tractor Company was an independent dealer and appellee had no control over its business. Sales made by Weaver were on its own account. Thus, if a Young swivel

were sold to a logging company employing the appellant, not only would Young have no connection with appellant, but neither would Weaver. At any rate, no activity of the Young Iron Works within the state gave rise to the claim of liability which is asserted in the complaint in this case. Thus the test of "activity giving rise to the claim of liability" is not met by the facts in the case at bar.

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## II.

**WHETHER A FOREIGN CORPORATION IS "DOING BUSINESS" SO AS TO MAKE IT AMENABLE TO PROCESS OR TO STATE REGULATIONS IS A QUESTION OF FACT.**

Appellant again errs in saying the District Court overlooked the distinction of doing business, so far as service of process is concerned, and submitting to state regulation. The District Court found factually here that respondent was not in California sufficient for the service of process on it.

In this connection, it is interesting to note the case of *Minnesota Mining & Mfg. Co. v. International Plastic Co.*, 159 Fed. (2d) 554. This was decided subsequent to the *International Shoe Co.* case and quoted extensively from that case, and then said on page 564:

"Whatever applicability, if any, this case may have on the question now before us, it certainly establishes the proposition that the 'boundary line between those activities which justify the subjection of a corporation to suit, and those which do not' is a question of fact."

The "service" attempted to be made by the appellant here is pursuant to a California statute, which by its own terms is applicable to corporations actually and actively doing business in California.

No "service" was ever attempted to be made on any salesman or representative of appellee deemed to be in the State of California and carrying on its affairs actively there.

Note that in the *International Shoe Co.* case, relied on by appellant, the service there sought to be sustained was made by (a) registered mail to the home office of the company and (b) personally upon resident sales agents who were permanently residing in the state, with display samples maintained there on a semi-permanent basis.

Reference is made by appellant to the case of *McMillan Process Co. v. Brown*, 33 Cal. App. (2d) 279, 91 Pac. (2d) 613, which was cited by the District Court in its opinion. That was a case in which the right of the plaintiff foreign corporation to bring an action in the California Court was challenged on the ground that plaintiff was doing business in California but had not complied with the laws there. The Court in that case reviewed the facts concerning the activities of the plaintiff corporation in California and held they were not sufficient to constitute doing business in the sense that the corporation was engaged in intrastate business. In that case the plaintiff corporation and the defendant entered into a contract under which defendant was given the right to use, in California, a certain patented machine for defiberizing

wood. The contract provided for the delivery of additional machines.

The title to the machines was retained by the corporation. Payments for the use of the machines were to be made on a royalty basis. The corporation was to have access to defendant's books, records, shipping documents, memorandums, and other data kept by the defendant in conducting his business. The corporation was given the right to repossess the machines in case of default. The president of the corporation went to California for the purpose of making certain changes in the machines for purpose of making them operate properly.

The determination of the problem in the *McMillan* case was purely factual as it is in the instant case, and as it is in all cases involving the question of what constitutes doing business and whether for the purpose of making a foreign corporation amenable to process or subject to state regulation or otherwise.

In *Liquid Veneer Corp. v. Smuckler* (9th C. C. A.), 90 Fed. (2d) 196, the Court found that the corporation was amenable to process under the facts stated at page 200 of the opinion as follows:

“There can be no doubt that the defendant, at the time and prior to service upon it by serving the Secretary of State, shipped merchandise in bulk and warehoused it in San Francisco for present and future use in filling its orders; that from the San Francisco stock shipments were made to Los Angeles to fill orders and that orders were immediately filled from the stock kept in California.”



In *State v. Ford Motor Company* (S. C.), 38 S. E. (2d) 242, the Court after reviewing the facts concerning the extensive operations of the Ford Motor Company in the State of South Carolina, and after reviewing a number of decisions dealing with the various phases of "doing business", at page 251, of the opinion, said:

"Consideration of the foregoing authorities \* \* \* is convincing that under the evidence adduced and the facts found in the case, appellant was doing business in South Carolina amply sufficient to subject it to the jurisdiction of the court at the time of the commencement of this action and render applicable to it the statutory provision for service which was followed; \* \* \*"

The Court then went on to show that as a factual situation the Ford Motor Company was not engaged in intrastate business.

Appellant cites the case of *Thew Shovel Co. v. Superior Court*, 35 Cal. App. (2d) 183, 95 Pac. (2d) 149, and in quoting from page 185 of the opinion has omitted from his quotation the following significant sentence:

"The facts of each case must meet the requirements essential to obtain jurisdiction under the applicable statute."

That is precisely what the District Court did in the instant case. The opinion of the Court (Rec. 31 to 36, incl.) clearly shows that the Court examined the facts for the purpose of determining whether the Young



Iron Works was amenable to process and for no other. Certainly the Court committed no error in doing so.

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### III.

THE YOUNG IRON WORKS WAS NOT ENGAGED IN ANY ACTIVITIES IN THE STATE OF CALIFORNIA WHICH MADE IT AMENABLE TO PROCESS.

Appellant urges that respondent here participated in California activities by soliciting orders and furthermore that that solicitation of orders has been augmented by other activities. In the *International Shoe Company* case the augmentation of the point about solicitation of orders consisted of two very specific matters not present in this case: (a) Display samples were maintained in permanent sample rooms for exhibiting samples in business buildings or in rented rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals was reimbursed by appellant; (b) the salesmen were actually residents and had been for years in the State of Washington and actively solicited sales as agents of International Shoe Co. on a commission basis. At page 320 of the opinion in the *International Shoe Co.* case, it is noted that the activities of International Shoe Co. were not irregular or casual, but it was constantly and actively doing business in the state.

It is particularly noted about the *International Shoe Co.* case that there the corporation was seeking to escape accountability in the Washington Courts

for unemployment compensation tax based on payrolls with reference to salesmen employed by the corporation, who regularly and permanently resided in the State of Washington and who were actively and continuously on business there with displays and samples maintained in the state at all times. The obligation sought to be enforced against International Shoe Co., therefore, was the kind of an obligation that directly arose out of and was connected with the activities of the corporation that were within the State of Washington.

In other words, the tax which the State of Washington sought to impose through the Court proceedings and administratively through the Department were obligations incident to payrolls of persons whose activities specifically were in the State of Washington. The only excuse sought for claiming the corporation and those employees were not in the State of Washington was that their business pertained to interstate commerce. Obviously, the fact that the business *pertains* to interstate commerce is not of itself sufficient to prove whether a corporation is or is not present within the state, in the sense that it has made itself amenable to local process.

In *Frene v. Louisville Cement Co.*, 134 Fed. (2d) 511, the activities of the corporation's agent in the District of Columbia went far beyond mere solicitation. The defendant cement company was a Kentucky corporation. It was in the business of selling cement and cement products. The company agent resided in Chevy Chase, Maryland, a suburb of Washington. He

was a graduate engineer and spent "two thirds to three fourths of his time in Washington" which he said was the biggest market in his territory. The agent visited construction jobs where his company's products were being used and would aid the contractors in their construction problems. He took specimens of work to the government agents for the purpose of obtaining government approval. During the particular construction job involved in that case the agent inspected the work as it progressed and saw that the cement products were properly mixed, and was being properly spread, and was being used in the manner intended by the company. The agent carefully examined the plans and specifications, visited the work regularly while in the course of construction, and pointed out minor and major details to the brick masons. On many jobs the agent used his engineering ability to aid in construction work. The agent was also to work with various government agencies and departments toward the end that his company's products would meet the government specifications. The agent aided in preventing and clearing up misunderstandings and difficulties arising in the course of the performance of his company's contracts. The agent's activities there went far beyond the casual visits of appellee's representative.

An interesting case, which reviews the principal authorities upon the subject and which was decided after the *International Shoe Co.* case and with that case in mind, is *McWhorter v. Anchor Serum Co.*, 72 Fed. Sup. 437. This was decided in the United

States District Court, Western District of Arkansas. There a Missouri Corporation employed a salesman, residing in Arkansas, upon a monthly salary and expense account to act as veterinary representative. It was the duty of the salesman to call on druggists and dealers with the idea of selling the products of the Missouri company. Orders were sent to Missouri and in all cases shipped directly to the dealer. Jurisdiction was challenged. The Arkansas statute authorized service of summons upon the Secretary of State on behalf of foreign corporations "who shall do any business or perform any character of work or service in this state." It was held that a Missouri corporation which had no wholesalers or stock of goods in Arkansas, but merely a soliciting agent to secure orders which were filled outside the state and the goods shipped directly to purchasers, was not "doing business" in Arkansas within the Arkansas statute providing for service of process on foreign corporations.

In *Creamery Package Mfg. Co. v. State Board of Equalization*, 166 Pac. Rep. 952 (Wyo.), the State of Wyoming attempted to collect a sales tax against an Illinois corporation which had sold machinery to customers in the State of Wyoming in interstate commerce. A salesman of the company occasionally travelled through the state to take orders. He had no headquarters in Wyoming, but lived in Denver. Orders were subject to approval by the corporation at its Denver office. Goods were shipped f.o.b. from the Illinois or Colorado office. Sometimes the cor-



poration, if requested, supervised installation of equipment, but the actual installation was made by men engaged by the purchaser. It was held that the supervision of installation was merely incidental to interstate commerce and did not constitute doing business in the State of Wyoming and that the activities described above did not constitute, "the doing, carrying on, transacting or engaging in business in the State of Wyoming" within the meaning of the statute, therefore attempted service upon an agent of the corporation in the State of Wyoming was void. In that case, the Supreme Court of Wyoming discusses and distinguishes the *International Shoe Co.* case, which had been previously decided.

Another later case in which *International Shoe Co.* case was discussed is the case of *Ladd v. Brickley*, 158 Fed. (2d) 212, where at page 218, the Court said:

"Paper Company has ceased to do local business in Massachusetts. It does have representatives there who solicit offers from Massachusetts prospects looking to transactions which are completed by the shipment of goods in interstate commerce. The Massachusetts court has said that such solicitation is not such doing of business in Massachusetts as to make a foreign corporation subject to suit there. We now know that systematic canvassing by travelling salesmen who solicit offers for interstate sales can constitutionally subject the employing company to liability for a state's unemployment compensation fund. That is not the same thing as saying that a law suit may be pursued against the foreign



corporation under the same set of facts. But here the fact that the state court has ruled that such solicitation does not constitute doing business on which to found suit settles the question adversely to the plaintiff and the foreign corporation seeking to evade litigation in that state does not need to try out the question of its constitutional protection against such litigation. It looks, therefore, as though the current activities of Paper Company in Massachusetts form no basis for holding it amenable to suit in Massachusetts courts. The significance of its past activities has already been discussed above."

The same result, in substance, was registered by the United States District Court for the Southern District of New York at page 836 of its opinion in a case decided November 12, 1946, entitled *Ladaas v. Canister Co.*, 69 Fed. Sup. 835.

Another interesting decision is by the Circuit Court of Appeals, Second Circuit, by Judge L. Hand in the case of *Bomze v. Nardis Sportswear, Inc.*, 165 Fed. Rep. (2d) 33. At page 35 of the opinion Judge Hand said, regarding the *International Shoe Co.* case:

"The Supreme Court there declared that the corporation's 'presence' was to be determined by balancing the opposed interests: The convenience of the obligee against the burden upon the corporation. That is a test not different in kind from that which has been repeatedly used when the inquiry is whether it will 'unduly burden' interstate commerce to fetch a corporation, engaged in such commerce, from the place of its principal

activities to defend the action. If that be the test, the question at once becomes relevant whether the action is based upon a liability arising out of the local activities; for it is almost always less burdensome to subject a corporation to the defense of actions so arising than to those arising elsewhere."

and continuing on page 36 said:

"Nevertheless, we hesitate to say that the New York courts will occupy the new enclave, now opened to them by *International Shoe Co. v. Washington*, supra; and, until they do, we see no other course but to compare the facts in the case at bar with those which existed in the bellwether decisions of the state, and to appraise—a more candid word would be to guess at—the importance of any differences. This we shall try to do."

The Court finally held, on page 37, that the corporation was doing enough business in New York to satisfy the state decisions and that since the cause of actions arose, at least as to New York sales, "out of those activities which made the corporation present, any federal question is set at rest."

In that case, the corporation employed agents in New York "to solicit orders and to further the sale of" women's sportswear garments. The orders were subject to the approval of the home office, but the agents were obligated to maintain a show room for the display of goods and to employ their own assistants. They were to receive a commission and an expense allowance for the maintenance of the show

room. These agents employed additional salesmen, maintained an office and office help. They paid local taxes, had telephone service, etc. This, of course, clearly constitutes doing business, but the case is cited to show the discussion of *International Shoe Co.* case, upon which appellant so completely relies.

On page 27 of appellant's brief, a very broad statement is made that there are many decisions holding "That the selection of dealers or the creation of distributorships was sufficient to constitute doing business for purposes of process." Then certain cases were cited. An examination of each and every case will show that none of them support the above statement. Moreover, there are many quotations from appellant's brief which, when compared with the facts of the case from which the quotation is taken, are found to have no application to the case at bar. As Judge Lemmon, United States District Court Judge, said in his opinion and order (Rec. 31, 35):

"Often an announced legal principle is misleading when torn from its moorings. Generalization must be evaluated in the light of the circumstances which gave them expression."

With reference to the cases cited on page 27 of appellant's brief, we find the following:

The case of *Vilter Mfg. Co. v. Rolaff*, 110 Fed. (2d) 491, simply held that a foreign corporation operated in Missouri through a sales representative. This agent had an office in St. Louis. The name of Vilter Manufacturing Company was on the door. The company

had its name in the telephone directory of St. Louis and in the building directory where the office was located. It had another office in Kansas City. The sales representative was not an independent dealer, buying and selling for his own account, but an actual agency representative. The company had a representative who was consulted on technical matters of installation, adjusted complaints, and actually assisted in the supervision of installation jobs. The company hired local labor in Missouri to attend to installations. Payments were received at the St. Louis or Kansas City office, as the situation might be, and remitted to the home office in Milwaukee. The company received correspondence at the St. Louis office. Offers were made by the agent in the company's name and the company accepted offers directed to St. Louis. This reflected a long-continued course of business in the state. The above, of course, bears no manner of resemblance to the case at bar.

In *Carroll Electric Co. v. Freed Eisemann Radio Corp.*, 50 Fed. (2d) 993, the question was whether the foreign radio manufacturing corporation was doing business in the District of Columbia. It was held that the foreign corporation and the so-called distributor were in fact and law principal and agent and that the distributor was not an independent merchant in control of his own business. The foreign corporation was doing business in the District of Columbia through this agent and was properly before the Court.

In *Bendix Home Appliances, Inc. v. Radio Accessories Co.*, 129 Fed. (2d) 177, the Court held that the



contract was not a pure sales contract, but that it had characteristics of agency and of factorage contracts. In addition, the foreign corporation sent employees into Nebraska who inspected and repaired defective machines in the hands of users in that state, gave demonstrations to owners of machines, and to the employees of Radio Accessories Co., the distributor agent, of the proper operation and maintenance of the machines. The foreign corporation made good the warranty covering the machines to individuals purchasing laundry equipment in Nebraska and that was the activity of Bendix and not the distributor. We are unable to see why this case should have been cited at all, because the jurisdictional issue was not squarely presented in the Appellate Court, Circuit Court of Appeals, Eighth Circuit. The Court at page 181 of the opinion said:

“But since the testimony at the trial was not brought into the record, we must assume that the evidence in the case was sufficient to support the decision of the lower court on the question of jurisdiction.”

In *La Porte Heinccamp Motor Co. v. Ford Motor Co.*, 24 Fed. (2d) 861, the La Porte company was a dealer handling Ford automobiles. The cars purchased from Ford were shipped on sight draft with bill of lading attached or driven into Maryland. A traveling representative of Ford would go into Maryland and call upon the dealers to see that they were carrying on the business in a proper manner and that service was furnished to the public. He would call



upon and inspect the place of business, rendering service and making repairs. He would instruct and stimulate the dealers. At page 862 of the opinion in that case, the Court said:

“Thus stated, his activities may seem to be so small a part of defendant’s business that it would be incorrect to say that Ford Motor Company is doing business in Maryland, as that phrase has been interpreted by the state and federal courts.”

But the representative of Ford Motor Company had more active duties than above described. He spent on the average five days a week in Baltimore, calling upon the dealers and service stations “constantly” and exercising “an intimate supervision and control of their business.” This agent or traveling representative would make collections in the state and this was a regular part of his duties. He would advertise the Ford car and accessories and he would adjust disputes between dealers in Baltimore and elsewhere throughout Maryland. It was held that the agent not only solicited and obtained business within the State, but made collections, exercised constant and intimate supervision of the details of the business of the dealers, and that his manifold duties and activities constituted a substantial part of the company’s business in Maryland.

*Knapp v. Bullock Tractor Co.*, and *Vance v. Chicago Portrait Co.*, 242 Fed. 543, were decided together. In each of these cases jurisdiction over the foreign corporation was questioned. The same general questions of law were presented. In the *Bullock Tractor*

case, an Illinois corporation was selling farm tractors in California through *resident* sales agents who were given exclusive territories and were required to solicit and procure orders. They were not independent dealers. They were required to receive shipments of goods to deliver, set up and start each machine sold, instruct the purchaser how to adjust it, and to be responsible for all tractors purchased. Orders taken by these agents for machines provided that they were not valid until accepted by the company and they contained a warranty and agreement to furnish free of charge any part proving defective within one year. The company also agreed to furnish a supply of repairs of spare parts. It was held that the corporation was doing business in California.

Reference has been made in the instant case to the replacement of parts. There has been no replacement of parts by the appellee. In case of defective equipment, Weaver Tractor Company could make a claim to Young Iron Works, and the Young Iron Works, if it allowed the claim, would give Weaver a money credit. Young Iron Works had no connection with or relation to the buyer of equipment from Weaver and made no installations or adjustments and performed no service.

In the *Chicago Portrait Co.* case, an Illinois corporation carried on the business of enlarging portraits and selling frames under a system of contracts providing for the employment of district managers, road managers, solicitors, etc., to secure orders. It had a road manager in California who had general super-

vision of the soliciting and securing of orders and of the work of the salesmen, and this man was required to devote his entire time to the business of the corporation in California. In other words, this corporation actually did engage in business in California by and through agents, salesmen and managers and the case bears no resemblance to the case at bar.

Plaintiff's counsel places much reliance in the case, *Thew Shovel Co. v. The Superior Court of the City and County of San Francisco*, 35 C. A. (2d) 183, 95 Pac. (2d) 149. In that case, where the shovel company, a foreign corporation, was held to be doing business in the State of California, the following facts were present:

(1) The manufacturer granted the distributor an exclusive right to sell, subject to the reservation allowing the manufacturer to deal direct with the customers and particularly with the right to sell to (a) governmental bodies and subdivisions; (b) other large users, and (c) purchasers for export;

(2) The sales prices and conditions of sales made by the distributor were fixed by the manufacturer;

(3) All sales to be consummated in California subject to the approval of the manufacturer;

(4) Sales contracts of the distributor were to be assigned to the manufacturer as security;

(5) Distributor authorized to receive and remit to the manufacturer notes and initial payments;

(6) Manufacturer retained title to consigned goods;

(7) Manufacturer reserved right to withdraw consigned goods to fill orders elsewhere;

(8) Sales contracts and goods sold on consignment to be assigned to manufacturer;

(9) Notes on account of deferred payments taken in distributor's name, but endorsed over to manufacturer;

(10) Manufacturer agreed to advertise its products;

(11) Manufacturer agreed to furnish printed matter to distributor for distribution;

(12) Manufacturer agreed to furnish engineer for installation service;

(13) The distributor was to collect down payments, assist in collecting installments, remitting to the manufacturer such amounts as were due;

(14) Distributor agreed to furnish at least one salesman for that work (collections);

(15) Replacements of defective parts made by distributor who returned the defective parts to manufacturer, who then gave credit to distributor;

(16) Distributor required to make weekly report to manufacturer of all prospects and of the status of transactions;

(17) Manufacturer provided in the contract that reason for requiring acts to be done in that particular fashion was to avoid status of "doing business in California".



Obviously, the activities of Young Iron Works fall far short of those before the Court in the *Thew Shovel* case.

It must be constantly kept in mind that the cases upon which appellant relies are *those in which actual agency existed as a fact and the foreign corporation's agents were present in the state in person and conducted activities therein as a regular and systematic course of business.*

Here, the appellee sustained the ordinary relationship of manufacturer in one state selling to an independent dealer in another, the manufacturer making casual and brief visits upon the dealer at infrequent intervals. Weaver Tractor Company was not in any respect under the control or direction of Young Iron Works. If there is any basis in this record for holding that Young Iron Works was doing business in California, then there is no such thing as pure interstate commerce and every foreign corporation could be sued in a state in which its products were sold by an independent dealer or distributor. Such is not the law and such was not the holding of the Supreme Court in the case of *International Shoe Co. v. Washington*, 326 U. S. 309, upon which appellant heavily relies.

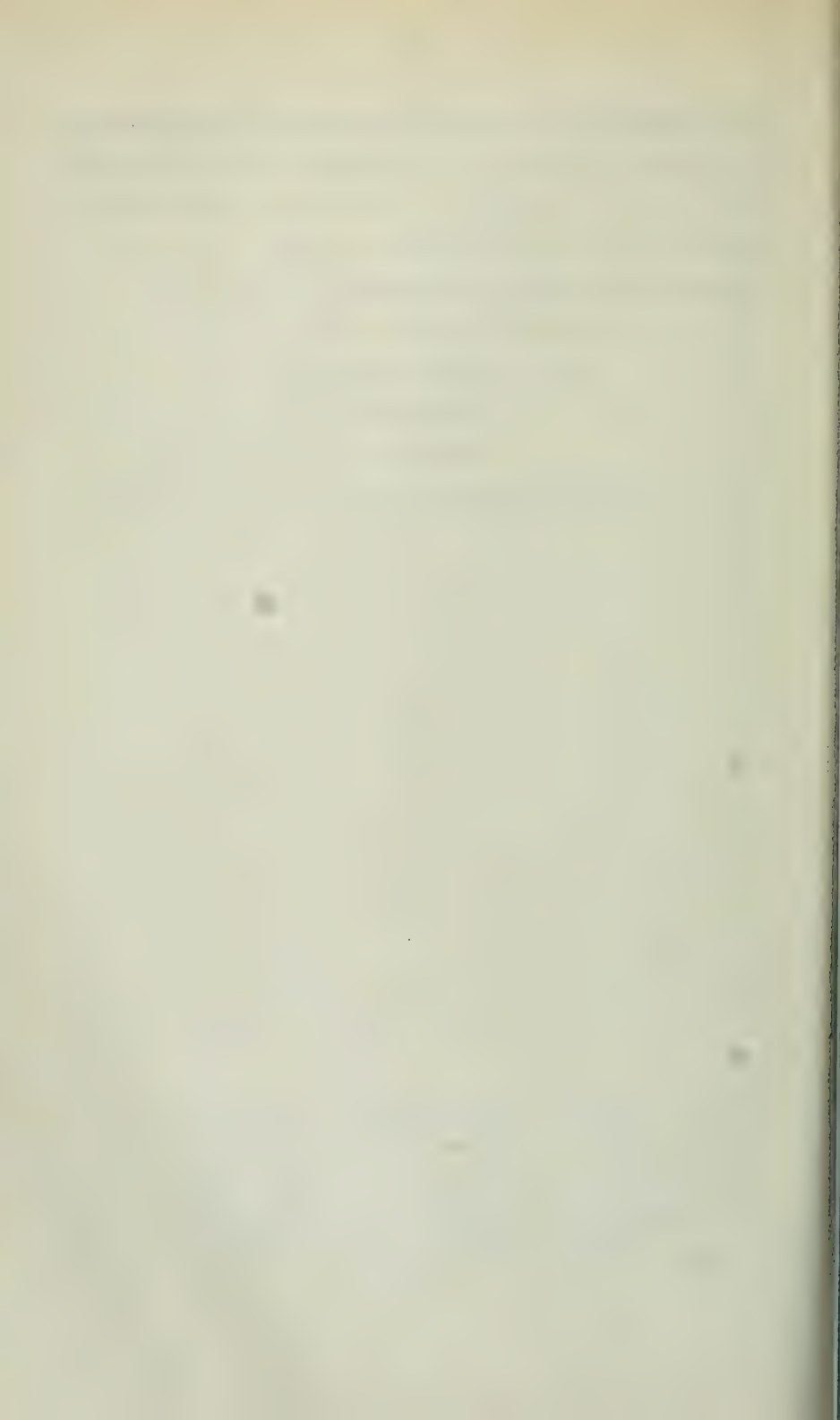
In conclusion, appellee respectfully submits that the order quashing the service should be sustained. Neither under the presence theory nor the corporate activity giving rise to the claimed liability theory nor upon the substantial justice theory can this service



be sustained. The corporation was not doing business in the State of California nor engaged in any activity there that would warrant its being subjected to process in the State of California.

Dated, Sacramento, California,  
August 27, 1948.

Respectfully submitted,  
EDMUND DAVIES,  
JOHNSON, WARE AND DAVIES,  
*Attorneys Appearing Specially for Appellee.*



No. 11907

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOHN R. QUINN, County Assessor, and H. L.  
BYRAM, County Tax Collector, of Los An-  
geles County,

Appellants,

vs.

AERO SERVICES, INC., a corporation, debtor,  
Appellee.

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Transcript of Record

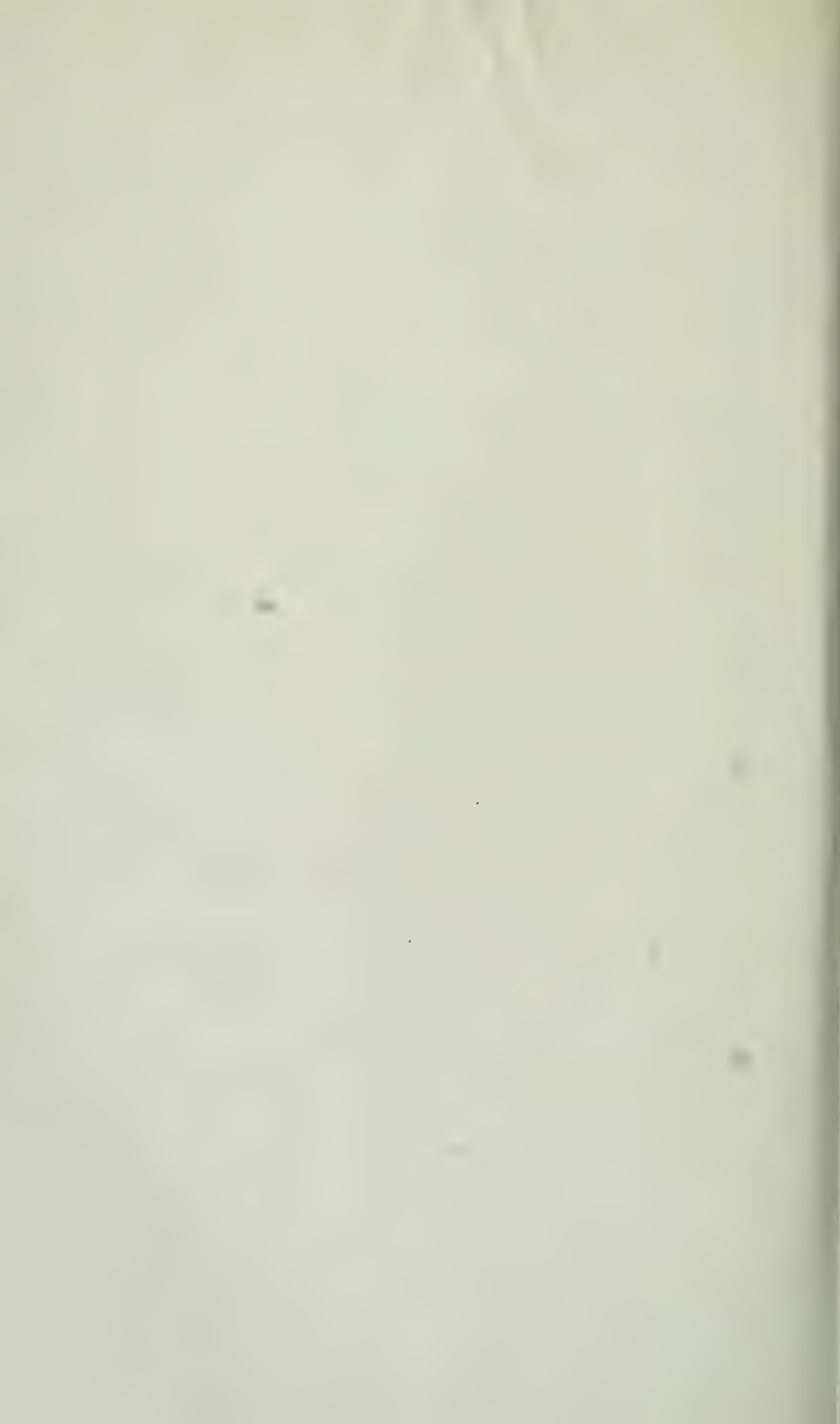
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Upon Appeals from the District Court of the United States  
for the Southern District of California,  
Central Division

FILED

JUN 24 1948

PAUL P. O'BRIEN,



No. 11907

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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JOHN R. QUINN, County Assessor, and H. L.  
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Appellants,

vs.

AERO SERVICES, INC., a corporation, debtor,  
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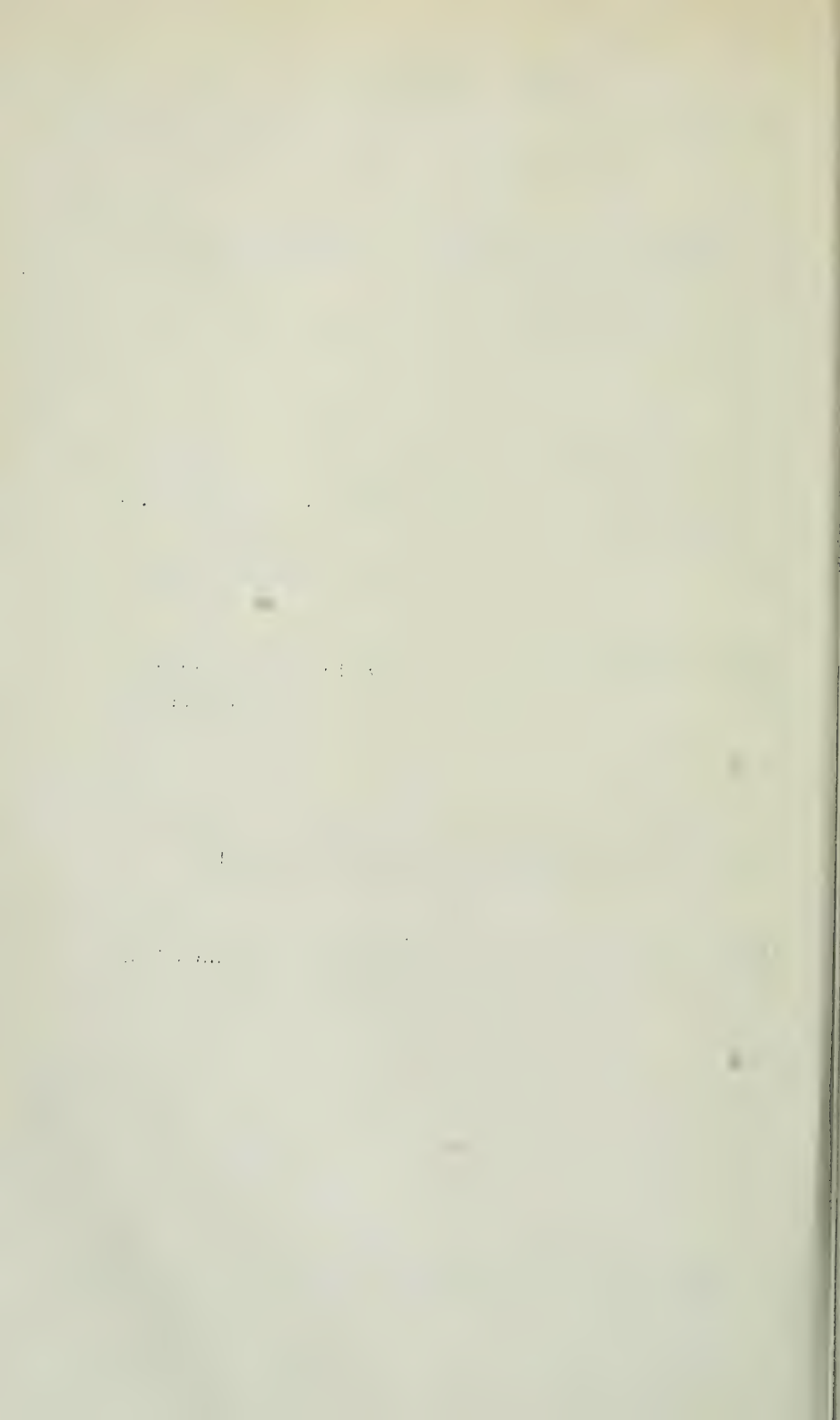
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Upon Appeals from the District Court of the United States  
for the Southern District of California,  
Central Division

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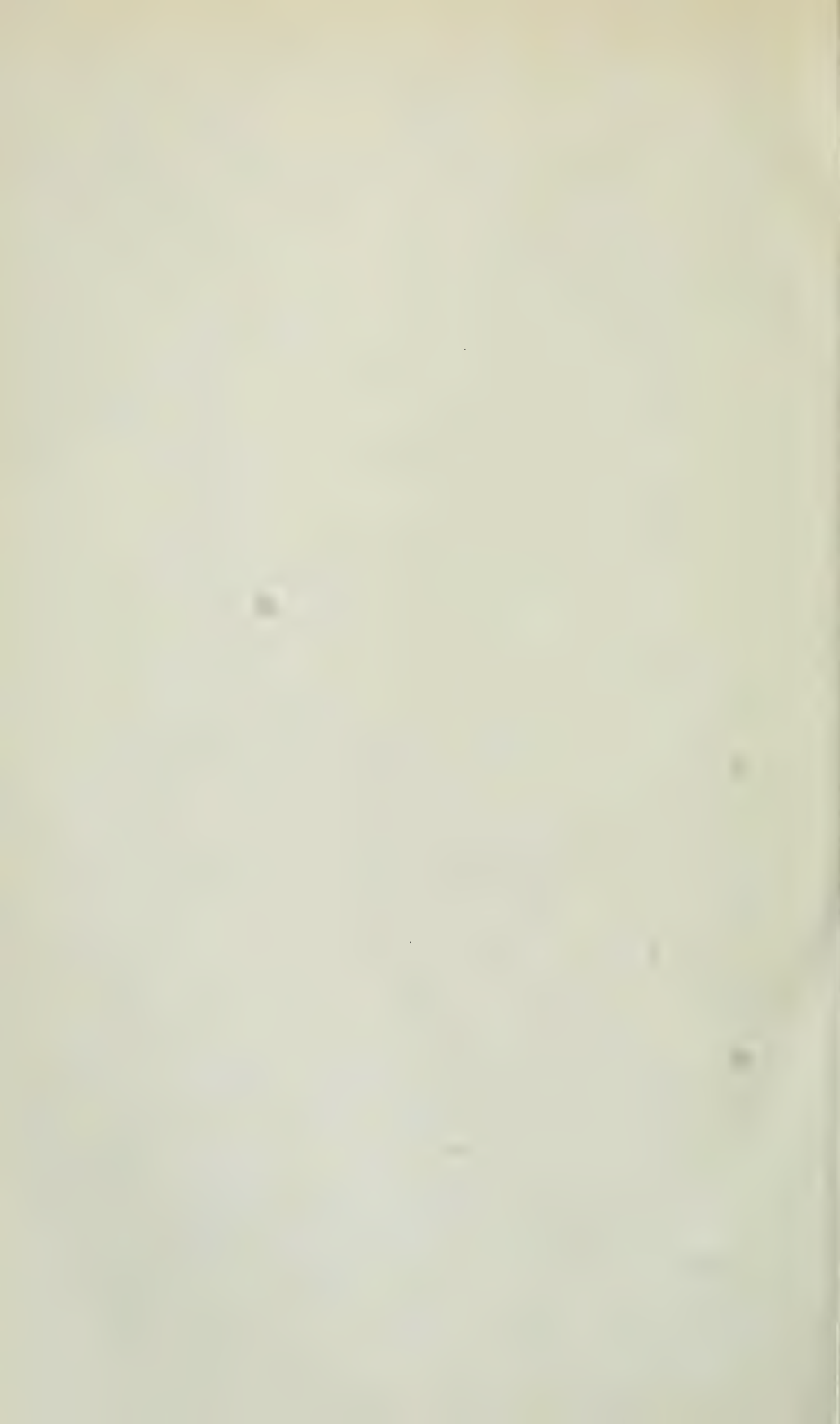
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is *printed* and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

HAROLD W. KENNEY,

County Counsel,

ANDREW O. PORTER,

Deputy County Counsel,

1100 Hall of Records,

Los Angeles 12, Calif.

For Appellee:

COBB & UTLEY,

633 Subway Terminal Bldg.,

Los Angeles 13, Calif. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the  
Southern District of California, Central  
Division

In Bankruptcy No. 44420-O'C

In the Matter of:

AERO SERVICES, INC., a Corporation,  
Debtor.

PETITION UNDER CHAPTER XI (SECTION  
322) OF THE BANKRUPTCY ACT

To the Honorable Judges of the Above-Entitled  
Court:

The verified petition of Aero Services, Inc., a  
corporation, respectfully represents to the Court as  
follows:

I.

That your petitioner is now and at all times herein  
mentioned has been a corporation duly and regu-  
larly organized and existing under the laws of the  
State of California, having its principal place of  
business at Metropolitan Airport, in the city of Van  
Nuys, County of Los Angeles, State of California,  
being engaged in the manufacture of aeroplanes,  
aeroplane motors, parts and fittings, and is entitled  
to become a bankrupt under the Acts of Congress  
relating to bankruptcy, and is not a municipal, rail-  
road, insurance or banking corporation or a building  
and loan association.

II.

That your petitioner has had its principal place  
of business and office at Metropolitan Airport, in the

city of Van Nuys, [2] County of Los Angeles, State of California, within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

### III.

That no bankruptcy proceeding has heretofore been filed by your petitioner and no involuntary petition in bankruptcy is now pending against it.

### IV.

That your petitioner is unable to pay its debts as they mature and proposes the arrangement with its unsecured creditors as hereinafter set forth.

### V.

That your petitioner alleges, as required by Section 324, Chapter XI of the Bankruptcy Act, as amended:

- (a) That your petitioner has no executory contracts.
- (b) That a statement of affairs of your petitioner will be filed within the time directed by the above-entitled Court.
- (c) That the Clerk's filing fee will be paid upon the filing of this petition.
- (d) That your petitioner's assets are located at Metropolitan Airport, in the city of Van Nuys, County of Los Angeles, State of California.

### VI.

That your petitioner has acquired certain aeroplanes from the United States Government and has

been engaged in remodeling and reconditioning said planes so that they may be sold as executive transports. That the demand for that particular type of aeroplane is extensive and an immediate sale can be effected upon the completion of said planes. That the sales price should be \$125,000. That attached hereto and marked Exhibit "D" is a list of said planes, the original cost, labor and materials expended in [3] reconditioning the same, the profit that should be realized upon the conclusion of said program, the amount required to be paid to the Reconstruction Finance Corporation, now War Assets Corporation, and the time required to complete each of said planes.

In addition to the above planes, the company owns a Douglas C-47 and a Lockheed 12 on which there is a chattel mortgage in favor of the Bank of America securing a note in the amount of \$45,000. The C-47 is now in a condition to be sold and the market value of the same is \$62,000.

That petitioner should receive from accounts receivable approximately \$30,000 within the next 60 days. That the total budget for the first month's operation is set forth in Exhibit E attached hereto and should cover work required upon four Lockheed C-60 planes to be completed in the time set forth in Schedule D attached hereto.

## VII.

That your petitioner's financial position has become involved by reason of threatened action by certain small unsecured creditors followed by at-

tachment proceedings which have prevented your petitioner from procuring expected bank financing required to complete the aeroplanes in the process of being remodeled and reconditioned. That upon the completion and sale of said planes, your petitioner will be in a position to pay all of its creditors in full.

### VIII.

That in order to realize the reasonable market value of said aeroplanes it is necessary for the same to be completed and that material loss will be sustained by your petitioner and the creditors in the event that your petitioner is not allowed to continue its manufacturing program without the interference of attachments and proceedings brought by creditors.

That your petitioner's past operations are as follows: [4]

That your petitioner was incorporated under the laws of the State of California in 1942 and operated as a corporation until August 31, 1944, at which time J. Gordon Hussey and associates rented the tangible properties of the corporation and carried on operations under the fictitious name of J. Gordon Hussey doing business as the Aero Services. That in January, 1946, said lease arrangement was cancelled and the corporation has since carried on the business formerly operated by J. Gordon Hussey under the corporate name. That in connection with said operations an undetermined tax liability has arisen and is now being subject to an audit by the Collector of Internal Revenue upon a corporate en-



tity basis from the formation of the corporation to date. That it is estimated that the liability for taxes will not exceed \$300,000, but the Government in order to protect its position has filed a jeopardy assessment of \$500,000.

On or about January 14, 1946, there was organized a California corporation known as Aero Lines, a corporation, which corporation acquired certain assets from your petitioner and J. Gordon Hussey. That all of the stock of said corporation is pledged to secure a note executed by J. Gordon Hussey in favor of your petitioner given as the payment price for the assets transferred by your petitioner to J. Gordon Hussey who in turn transferred the same to Aero Lines, a corporation, for and on account of the children of said J. Gordon Hussey, to wit: J. Gordon Hussey, Jr., and Constance Louise Hussey. That Aero Lines is engaged in the manufacture of an automotive house trailer. Said company is operating as a separate entity but has been processing its work through your petitioner's factory and certain employees of your petitioner devote a portion of their time to the services of said trailer company, and time sheets and reasonable charges for said services and joint use of employees is maintained, and said trailer company will make settlement monthly for said services rendered by [5] your petitioner to them.

Petitioner owns 48 acres of land adjoining the Palmdale Airport. J. Gordon Hussey has for a number of years held a lease on the property now being used for the Palmdale Airport, which leased

premises adjoins the aforesaid 48 acres. This is a separate asset of Mr. Hussey as an individual and he is willing that the same be placed under the jurisdiction of this Court until the payment of creditors' claims herein to the extent that the same may be transferred under the terms of said lease.

### IX.

That J. Gordon Hussey heretofore caused to be organized a California corporation known as Aero Engines on January 18, 1946. That certain assets were transferred to said corporation conditioned upon a permit being obtained from the Corporation Commissioner of the State of California and stock being issued as permitted by said permit in payment for said assets. That no permit has been obtained and said assets have been reconveyed to your petitioner subject to existing encumbrances.

### X.

That attached hereto and made a part hereof is a list of creditors now known to petitioner, with their addresses if known, and a statement of the assets of petitioner.

## DEBTOR'S PROPOSED PLAN OF ARRANGEMENT

That your petitioner proposes the following plan of arrangement:

Article 1. That the creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A. Expenses of operation under plan of arrangement as may be allowed and ordered paid.

Class B. Expenses of administration that may be allowed and ordered paid.

Class C. All creditors entitled to priority as provided [6] in Section 64a, subdivisions 2, 4, and 5 of the Acts of Congress relating to Bankruptcy, as amended.

Class D. Obligations as they mature to secured creditors in accordance with the terms of their contracts.

Class E. To pay pro-rata, at such times as this Honorable Court may direct and at intervals not to exceed six months, dividends upon unsecured creditors claims until said claims are paid in full.

Article II. That said plan of arrangement be carried out by permitting the debtor to remain in possession of its assets with the right to complete and sell the aeroplanes now owned by the debtor.

Article III. That petitioner be permitted to make payments from time to time when funds are available in accordance with this plan of arrangement and that petitioner be given an extension of time within which to complete this arrangement and to discharge all of the creditors' claims as provided in this arrangement.

Article IV. That petitioner be permitted to remain in possession of its assets and continue its pro-

gram of manufacture and finishing of aeroplanes, the purchase of materials, the employment of workmen and to conduct and operate its business under the supervision and direction of this Honorable Court with authority to employ agents, managers, assistants and the necessary labor as may be required to carry out the debtor's plan of arrangement including the right to borrow money and incur obligations as may be authorized and permitted from time to time by the above-entitled Court, and to secure said obligations if required so to do, as may be ordered and directed by the above-entitled Court.

Article V. All debts incurred after the filing of this petition prior to the confirmation of the plan of arrangement shall be paid in full and in such manner as ordered by the above [7] entitled Court.

Article VI. The Court shall retain jurisdiction of the debtor's property and the operation of same until the payment in full of all creditors' claims and this Honorable Court be authorized, in its discretion, to countersign all checks signed by the debtor in possession.

Article VII. In the event any claim is in controversy in respect to classification or the amount due, the debtor, under order of Court, may make such deposit in such manner as the Court may direct in respect to said disputed claim and proceed to

pay other creditors and be restored to possession pending a final determination of said disputed claim.

## XI.

That your petitioner is advised that Chapter XI of the Bankruptcy Act is the appropriate section of the Act under which to seek relief and that your petitioner verily believes that if its business can be operated in the manner herein designated and if permitted to continue to operate as proposed in this petition, your petitioner can pay all its just debts in full.

That it is necessary for the speedy and proper administration of the debtor's affairs and the equitable payment of creditors, that all creditors and parties be enjoined from commencing or prosecuting any suit or foreclosure proceeding in any form or manner other than before the above-entitled Court or without permission of the above-entitled Court.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act as amended. That all creditors and other parties be enjoined from commencing any suit in any Court or conducting any sale or foreclosure proceedings affecting the property of the petitioner or repossessing any property without order of this Honorable Court first had and obtained. That this [8] Honorable Court leave the debtor in possession, with full authority to operate and carry on the debtor's business affairs pending a confirmation



of the debtor's proposed plan of arrangement and that an adjudication be stayed. That this Honorable Court require debtor to open the necessary bank account or accounts for the purpose of properly conducting the business and that the funds may be withdrawn upon the signature and counter-signature as this Honorable Court may direct and to take such other steps and make such other orders herein as may be necessary for the protection of the debtor and all interested parties and that your petitioner be granted such other and further relief as is just and proper in the premises.

AERO SERVICES, INC.,  
a Corporation,

By /s/ J. GORDON HUSSEY,  
President.

By /s/ MILDRED STEVENS,  
Secretary.

COBB & UTLEY,  
By /s/ FRANCIS B. COBB. [9]

United States of America,  
Southern District of California,  
Central Division,  
State of California,  
County of Los Angeles—ss.

I, J. Gordon Hussey, President of Aero Services, Inc., a corporation, the petitioning debtor mentioned and described in the foregoing petition,

hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ J. GORDON HUSSEY.

Subscribed and sworn to before me, this 3rd day of June, 1946.

[Seal] /s/ BLANCHE MORRIS,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires 7-22-47. [10]

CERTIFIED COPY OF RESOLUTION  
ADOPTED BY THE BOARD OF DIRECTORS  
OF AERO SERVICES, INC., A CALIFORNIA CORPORATION

Resolved that the President and/or Secretary of this Corporation be and each of them hereby is authorized to file in the District Court of the United States, for the Southern District of California, Central Division, a petition for an arrangement or other appropriate petition under the applicable laws of the United States for and on behalf of the Corporation.

Be It Further Resolved that the firm of Cobb & Utley be and they hereby are employed by the Corporation as its attorneys to file said petition and prosecute such proceedings with relation thereto as in their judgment may be fit and necessary in the premises.

The foregoing resolution was put to a vote and unanimously adopted.

I hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of said corporation at a duly and regularly called and held meeting of said Directors held on the 31st day of May, 1946, at which all of the directors of said corporation were present and voted; that said resolution appears on the minutes of said meeting and that it has never been revoked or modified.

I also certify that the foregoing resolution was fully approved by B. D. Schuster, J. Gordon Hussey, E. W. Wheelock, and Mildred Stevens, being all of the Directors of said Corporation.

In Witness Whereof, I have hereunto set my hand and the seal of the Corporation, this 31st day of May, A.D. 1946.

[Seal]      /s/ MILDRED STEVENS,  
Secretary of Aero Services, Inc.,  
a California Corporation.

[Endorsed]: Filed June 3, 1946. [11]

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[Title of District Court and Cause.]

**APPROVAL OF DEBTOR'S PETITION AND  
ORDER OF REFERENCE UNDER SEC-  
TION 322 OF THE BANKRUPTCY ACT**

At Los Angeles, in said District, on June 3, 1946, before the said Court the petition of Aero Services, Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and

within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Aero Services, Inc., a corporation, shall attend before said referee on June 10, 1946, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Paul J. McCormick, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on June 3, 1946.

[Seal]

EDMUND L. SMITH,  
Clerk.

By /s/ F. BETZ,  
Deputy Clerk.

[Endorsed]: Filed June 3, 1946. [12]

---

[Title of District Court and Cause.]

Appearances:

Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, 1100 Hall of Records, Los Angeles 12, California, Mutual

9211, Attorneys for John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector, Petitioners on Review.

Cobb & Utley, 633 Subway Terminal Building, Los Angeles 13, California, MADison 64123, Attorneys for Debtor.

REFEREE'S CERTIFICATE ON PETITION  
FOR REVIEW OF ORDER UPHOLDING  
JURISDICTION RE TAX CLAIMS

To the Honorable J. F. T. O'Connor, Judge of the  
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

The County Assessor and the County Tax Collector of Los Angeles County have duly filed their petition for the review of an order made by your Referee in this matter on September 8, 1947, in which he overruled their objections to the jurisdiction of this Court to determine in this proceeding the value of the personal property of the above-named debtor for county tax purposes.

The Proceedings

On the first Monday in March, 1946, the debtor herein was the owner of certain real and personal property. On May 14, 1946, [13] a declaration for county tax purposes was made and verified on behalf of the debtor by one V. W. Nelson, its audi-



tor, and the same was thereupon filed with the County Assessor; said statement shows that the value of the debtor's personal property was \$355,-710.00 as of the first Monday in March, 1946. Thereafter, on an undisclosed date, the County Assessor valued the said personal property for county tax purposes at said sum of \$355,710.00.

On June 3, 1946, the debtor commenced this proceeding by filing herein its petition under Chapter XI of the Bankruptcy Act and, on the same date, appropriate orders were made herein permitting it to remain in possession of its assets and to continue the operation of its business under the control of this Court. The said petition under Chapter XI of the Bankruptcy Act is still pending, but no order has thus far been entered confirming the debtor's plan of arrangement with its creditors. The debtor still continues in possession of its assets, but all of its business operations have been suspended.

In the latter part of 1946, the debtor received from the County Tax Collector a tax bill covering the taxes on its real and personal property as of the first Monday in March of said year. Said taxes became a lien on the real property of the debtor as of such first Monday in March. The said tax bill shows the assessed value of the personal property of the debtor to be the aforesaid sum of \$355,-710.00 and that the amount of the tax thereon is the sum of \$22,333.25.

On December 6, 1946, the debtor filed herein its petition for an order to show cause requiring the County Assessor and the County Tax Collector to

show cause why this Court should not determine the amount of taxes due by it to the County of Los Angeles and why this Court should not direct the debtor as to the manner and time of payment of such taxes. An order to show cause being issued on the said petition, the Assessor and the Tax Collector, in due course, filed their answer thereto and also their objections to the jurisdiction of [14] this Court to proceed in the premises.

After a hearing duly had, your Referee made an oral ruling in which he overruled the said objections to jurisdiction and directed that the hearing proceed on the merits. Thereupon, the Assessor and the Tax Collector brought the matter before Your Honor and Your Honor ruled that your Referee should make a formal order on the question of jurisdiction so that a review might be taken therefrom by any party aggrieved thereby. Thereafter, a further hearing was had before your Referee on the question of jurisdiction and on September 8, 1947, your Referee filed his formal findings of fact and conclusions of law and his order in which he upheld the jurisdiction of this Court in the matter. It is from this order that this review is taken.

### The Questions Presented

The questions presented by this review are set forth in detail on pages 9, 10 and 11 of the petition for review which is going up with this certificate, but in the opinion of your Referee, the said questions may be summarized as follows:

(1) Is the County Assessor a quasi-judicial officer and, if so, does that fact deprive this Court of jurisdiction to determine the value of the personal property here involved for county tax purposes?

(2) Does this Court acquire exclusive jurisdiction to determine the value of the personal property here involved for county tax purposes by the filing herein of the aforesaid petition under Chapter XI of the Bankruptcy Act, in view of the fact that such petition was filed prior to the date fixed by law for application to the Board of Equalization for the equalization of taxes?

(3) Is the Board of Equalization a quasi-judicial body and, if so, is this Court deprived of jurisdiction in the matter here involved by reason of the fact that no application was made to the said Board for the [15] equalization of the taxes here in question?

(4) Is this Court without jurisdiction in the matter here involved by reason of any of the following situations:

(a) That the debtor continued the operation of its business with the authority and under the supervision of this Court;

(b) That the taxes here involved are a lien on the real property of the debtor;

(c) That the taxes here involved are entitled to priority of payment in this proceeding;

(d) That the taxes here involved are debts which are not dischargeable in bankruptcy;

(e) That the aforesaid declaration for county tax purposes was filed on behalf of the

debtor by its auditor and no other declaration was filed by the debtor;

(f) That since no application was made to the Board of Equalization for the equalization of the taxes here involved, the debtor corporation could not now question such taxes in any State Court and if this proceeding were not pending in this Court, the assessed valuation of the personal property here involved and the taxes based thereon would have become final and would have the force, finality and effect of a judgment.

### The Evidence

There is no dispute here as to any of the facts here involved and, consequently, there is no evidence to transmit other than the aforesaid declaration for county tax purposes which is going up [16] with this certificate.

### Referee's Findings of Fact, Conclusions of Law and Order

The originals of your Referee's findings of fact and conclusions of law and order are going up with this certificate.

### Papers Submitted

1. Petition for Order to Show Cause, etc., filed December 6, 1946.
2. Answer to Petition for Order to Show Cause, etc., filed December 18, 1946.
3. Suggestion of Lack of Jurisdiction of Subject Matter, filed December 20, 1946.



4. Supplemental Memorandum of Points and Authorities, etc., filed January 4, 1947.
5. Objections to Proposed Findings of Fact and Conclusions of Law, etc., filed July 14, 1947.
6. Findings of Fact and Conclusions of Law re Tax Claims, filed September 8, 1947.
7. Order Upholding Jurisdiction re Tax Claim, filed September 8, 1947.
8. Affidavit for and Order Extending Time within which to File Petition for Review, filed September 17, 1947.
9. Petition for Review of Referee's Order by Judge, filed October 6, 1947.
10. County's Exhibit No. 1, Declaration for County Tax Purposes, verified May 14, 1946.

Respectfully submitted this 27th day of October, 1947.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 27, 1947. [17]

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[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE  
IN CONNECTION WITH TAX CLAIM

To the Honorable Benno M. Brink, referee in  
bankruptcy:

The verified petition of the above-named debtor  
respectfully shows:



## I.

That your petitioner did on the 3rd day of June, 1946, file a petition under Chapter 11 of the Bankruptcy Act, and the above-entitled Court on said date entered an order permitting the debtor to remain in possession of its assets and to carry on its business.

## II.

That your petitioner has received a tax bill from John R. Quinn, County Tax Assessor, and H. L. Byram, County Tax Collector, for a sum totaling \$24,548.77. That included in said bill is a demand for the first installment of \$23,441.92, which first installment includes personal property taxes in the amount of \$22,333.26 which are based upon a valuation of the personal property belonging to the above-named debtor on March 1, 1946 in the amount of \$355,710.00. That [18] said assessment is in error in that your petitioner did not own or have the control of any personal property of the assessed value of any sum in excess of \$148,880.00 on March 1, 1946.

## III.

That your petitioner desires to pay all tax claims and that it is necessary to have a determination of the amount due the County Tax Collector of Los Angeles County prior to said payment.

Wherefore, your petitioner prays that the above-entitled court issue an order to show cause, directing John R. Quinn, County Tax Assessor, and H. L. Byram, County Tax Collector, to show cause at a time and place fixed by this court, why an order

should not be entered determining the amount of taxes due the County of Los Angeles, and directing the debtor as to the manner and time of payment, and for such other and further relief as is proper in the premises.

AERO SERVICES, INC.,  
a corporation,

By /s/ J. GORDON HUSSEY,  
President.

State of California,  
County of Los Angeles—ss.

J. Gordon Hussey being by me first duly sworn, deposes and says: That he is the President of Aero Services, Inc., a corporation, the petitioner herein, and the debtor in the foregoing and above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ J. GORDON HUSSEY,

Subscribed and sworn to before me this 20th day of November, 1946.

[Seal] /s/ FRANCIS B. COBB,  
Notary Public in and for said County and State.

[Endorsed]: Filed Oct. 27, 1947. Edmund L. Smith, Clerk, by F. Betz, Deputy. [20]

[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDER TO  
SHOW CAUSE IN CONNECTION WITH  
TAX CLAIM

Come now John R. Quinn, County Tax Assessor, and H. L. Byram, County Tax Collector, and in defense to the Order to Show Cause dated December 6, 1946, why the amount of taxes due the County of Los Angeles should not be determined, allege as follows:

I.

That John R. Quinn is the duly appointed, qualified and acting Assessor of the County of Los Angeles, and that H. L. Byram is the duly appointed, qualified and acting Tax Collector of said county.

II.

Answering paragraph II of said Petition for Order to Show Cause, admit that tax bills have been rendered to the debtor as stated therein based upon the valuation as stated therein; deny that said assessment is in error in that said debtor did not own or have control of any such personal property of such assessed value on March 1, 1946, or that said assessment is in error for any other reason. [21]

III.

Answering paragraphs III of said petition, deny that it is necessary to have a determination of the amount due to the County Tax Collector of Los Angeles County prior to payment, and allege that said assessed value and the amount of the personal property taxes based thereon have been and are

fixed and final under the laws of the State of California and have the force, effect and finality of a judgment, and that the amount of said taxes was determined in accordance with the Constitution and statutes of the State of California and cannot now be changed.

For a further, separate and second defense said respondents allege:

I.

That this Court has no jurisdiction or power to reduce or to in any way alter or amend the assessed value of said property, or any other property duly found and made by the officer authorized and required by law to make said assessments, to wit, the Assessor of the County of Los Angeles. That each and all of said assessments were duly and regularly made by the said Assessor of the County of Los Angeles in the manner prescribed by law and pursuant to the authority granted to him and *the duly* imposed upon him by the laws of the State of California. That said bankrupt failed to appear or otherwise make objection within the time required by the law of the State of California as to the valuation of said property before the reviewing body created by Article XIII, Section 9 of the California Constitution, to wit, the Board of Equalization of said County. That said assessed values and the amounts of the taxes based thereon have become, and are, fixed and final under the state law, and have the force, effect and finality of a judgment. Said respondents allege that this Court is bound by the state statutes [22] and decisions



respecting the creation, imposition, assessment, amount and validity of state and county taxes.

Said respondents admit that the above entitled Court has the proper authority to determine the amount and legality of said taxes, but allege that the scope of the Court's investigation and inquiry, and the power and jurisdiction of the Court in respect to same, is limited to the question of whether or not the taxes and the amount are correct under the state laws of the State of California providing for the imposition of said taxes; allege that this Court has no power to deny to the State of California the power and right to provide for the assessment of, and fixing of the amount of taxes for the counties of said state in such manner as the Legislature of said state sees fit, and for this Court to attempt to reduce assessed values or amounts of taxes which are legal, valid and final under state laws would be to supersede the powers of the Legislature in this respect.

For a further, separate and third defense said respondents allege:

### I.

That this Court has no power or jurisdiction in this proceeding to reduce or in any way alter or amend the assessed values of said property duly placed thereon by the County Assessor of the County of Los Angeles pursuant to authority of state law, for the reason that this proceeding is a proceeding under Chapter XI of the Bankruptcy Law; that said Chapter XI applies only to unsecured debts and does not affect or in any way alter the status



of secured debts. That at all times during the year 1946, being the year for which the assessment hereinbefore mentioned was made and the taxes levied, the debtor herein was the owner of, and still is the owner of, real estate in the County of Los Angeles. That the [23] law of the State of California did at all such times, and still does, provide that every tax on personal property is a lien upon the real property of the owner thereof. That by virtue of said statute all of said taxes are secured claims and debts, and their status cannot be altered or in any way affected by this Court under said Chapter XI proceeding.

For a further, separate and fourth defense said respondents allege:

I.

That this Court has no jurisdiction or power under the law to reduce the said assessed values or taxes computed thereon, or to in any way alter or amend the same, for the reason that this proceeding is, and has been at all times since its inception, a proceeding under Chapter XI of the Bankruptcy Act, and that under said Chapter XI priority claims are not affected. That under the provisions of said Chapter XI priority claims are excepted from the scope of said chapter. That said claims and debts hereinbefore mentioned, being for taxes due to a subdivision of the State of California, to wit, a county thereof, are priority claims under the Bankruptcy Act.

For a further, separate and fifth defense said respondents allege:

## I.

That it is provided under section 17 of the Bankruptcy Act taxes are not dischargeable debts. That, in so far as state law is concerned, the legality of said taxes cannot be questioned or considered in any state court, and the amount of said taxes are fixed and final, and that said taxes are in every respect valid and legal. That since this is not a dischargeable debt the debtor is and remains [24] liable therefor, and is now and will hereafter be amenable to the process of the state courts in an action to compel said debtor to pay said nondischargeable taxes regardless of what action this court may take. That the debtor herein is a corporation, and if it is discharged or otherwise released, or said Chapter XI proceeding is dismissed or otherwise disposed of, said corporation will be fully as liable in every way for said tax under the state laws and before the state court, as if this Court had never assumed to reduce said assessed value or said taxes. That this Court has no power to absolve this debtor from a nondischargeable, secured priority debt.

For a further, separate and sixth defense said respondents allege:

## I.

That on May 14, 1946, the said corporation debtor herein did, through its Auditor, make as required by Article XIII, Section 8 of the California Constitution, a return and statement to the County Assessor of the County of Los Angeles, under oath, setting forth the personal property owned by said

corporation, and the assessment value thereof, and that the value therein so stated under oath by said debtor corporation was the assessment value placed upon said property by the said Assessor and the same value which is alleged in the petition for order to show cause herein as having been excessive.

That the Assessor of the County of Los Angeles, and the said County, and the said Tax Collector thereof, and the Board of Equalization thereof, relied upon the representations so made under oath by the said debtor corporation of the value of its property, and included said value in the total assessed valuations of all property in the County upon which the tax rate for said County was computed in [25] order to raise sufficient funds to maintain said county government for the said tax year. That if said taxes based upon said value as so represented under oath to be correct are not collected, the funds of said Los Angeles County will be, and are, insufficient to provide for the expenses of said year, and that any amount in which said taxes might be reduced by this Court will be required to be charged to and made up by the other taxpayers of said County in subsequent years in order to make up the deficit. That said debtor corporation is by reason of the facts herein estopped from now asserting that said assessment value so represented by it under oath to be true and correct are untrue and incorrect.

For a further, separate and seventh defense said respondents allege:

## I.

That the taxable date in the State of California for the year 1946 was the first Monday in March of said year. That said date occurred about three months before reference of this case under Chapter XI of the Bankruptcy Act was had, and that on that date, and for several months prior thereto, and at all times hereafter to date hereof, the debtor has been in possession of said property and operating the business of said corporation under and pursuant to authority obtained from the Court under said Chapter XI. That by an act of Congress enacted in 1934, referred to in the decision of the Supreme Court of the United States, *Boteler v. Ingalls*, 84 L.Ed. 20, said debtor, operating his business under Chapter XI, is liable for taxes the same as if they were conducting said business as individuals without the interposition of the Bankruptcy Court. No individual or other person operating a business without the protection of the Bankruptcy Court under a Chapter XI proceeding, or otherwise, has any right or redress whatsoever to reduce the [26] assessed value of the tax except by application to the County Board of Equalization which is the reviewing body created by the State Constitution, and prescribed by the state laws of the State of California. This Court has no power or jurisdiction to reduce or in any way alter or amend the assessed value or the amounts of said property or taxes for the year 1946.

Wherefore, said John R. Quinn and H. L. Byram pray that it be ordered that the petition of the debtor corporation herein for reduction of assessed



value of its personal property for the year 1946 be denied, and for such other and further relief as to the Court may seem just and meet in the premises.

HAROLD W. KENNEDY,  
County Counsel, and

/s/ L. K. VOE,  
Deputy County Counsel,  
Attorneys for said  
Respondents. [27]

State of California,  
County of Los Angeles—ss.

H. L. Byram, being first duly sworn, deposes and says: That he is one of the respondents in the above entitled action; that he makes this verification on his own behalf and on behalf of the other answering respondent; that he has read the foregoing answer to petition for order to show cause in connection with tax claim and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon information and belief, and as to those matters that he believes it to be true.

/s/ H. L. BYRAM.

Subscribed and sworn to before me this 18th day of December, 1946.

J. F. MORONEY,  
County Clerk.

By /s/ MARIE E. McPHERSON,  
Deputy. [28]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 27, 1947.



[Title of District Court and Cause.]

SUGGESTION OF LACK OF JURISDICTION  
OF SUBJECT MATTER

(Rule 12 (h) (2) Civil Procedure.)

Comes now John R. Quinn, County Tax Assessor, and H. L. Byram, County Tax Collector, and makes suggestion to the Court that this Court lacks jurisdiction of the subject matter set forth in the petition for order to show cause in connection with tax claim filed on or about December 6, 1946, against said parties, and as grounds of said suggestion states (1) that the relief prayed in said petition for order to show cause in connection with tax claim is not within the jurisdiction of the above entitled Court to grant, and that said Court has no jurisdiction of the subject matter set forth in said petition in that the Federal Bankruptcy Court has no power to reduce or redetermine the assessed values for taxation purposes; (2) that said petition of said debtor does not state facts sufficient to raise a Federal question, or a question within the jurisdiction of this Honorable Court to consider, determine or decide for the same reason stated in ground (1) hereof.

Dated this 19th day of December, 1946.

HAROLD W. KENNEDY,  
County Counsel.

By L. K. Voe,  
Deputy County Counsel,

Attorney for John R. Quinn, County Tax Assessor,  
and H. L. Byram, County Tax Collector [30]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING SUGGESTION OF LACK OF JURISDICTION OF SUBJECT MATTER.

The Federal Bankruptcy Court has no power to reduce or redetermine assessed values for taxation purposes where such value has already been determined by the County through its own taxing officials in accordance with the procedure prescribed by state law.

Arkansas Corporation Commission and 51 County Tax Collectors of Arkansas, Petitioners, vs. Guy A. Thompson, as Trustee, 85 Law Ed. 1244; 313 U. S. 132; 61 Sup. Ct. 888; 45 A. B. R. N. S. 462.

Memorandum of Conclusions of District Judge Hollzer, dated Aug. 30, 1941, in re Santa Fe Distilleries, Inc., a corporation, Bankrupt, No. 32667-H, in the above entitled court.

Order by Referee Hubert F. Laugharn allowing claim of John R. Quinn, County Assessor, made Oct. 28 1941, in In the Matter of Radio Supply Co., a corp., Debtor, No. 38581-BH, in the above entitled court, on objections by Receiver George Goggin to assessed values in claim of County Assessor John Quinn for \$672.00 tax on personal property and solvent credits. [31]

(Grainger & Hunt, Attorneys)

*In re Ingersol Co.; Middelkamp v. Lea Trust*; C. C. A. 10 (decided Feb. 28, 1945) 148 Fed. (2) 282.

*Commonwealth of Penna. v. Aylward*, C. C. A. 8 (decided April 11, 1946) 154 Fed. (2) 714.

*Baumann v. Sheehan*, C. C. A. 8 (1944) 140 Fed. (2) 747.

The County Assessor in assessing property valuations exercises judicial powers, and the assessment is very much in the nature of a judgment.

*Carter v. Osburn*, 150 Cal. 620;

*Siebe v. Superior Court*, 114 Cal. 551;

*Palmer v. McMahon*, 133 U. S. 660, 669; 33

Law ed. 772, 776;

*Hager v. Reclamation Dist. No. 108*, 111 U.S.

701, 28 Law ed. 569;

*Birch v. County of Orange*, 59 Cal. App. 133;

*Judson on Taxation* (2nd Ed.) sec. 343;

3*Cooley on Taxation* (4th Ed.) sec. 1143, p.

2296, and sec. 1144, p. 2301;

*Bailey v. Berkey*, C. C. A. Cal. 81. Fed. 737;

*San Jose Gas Co. v. January*, 57 Cal. 614;

*Mahoney v. City of San Diego*, 198 Cal. 388

at p. 396, pt. 1;

*Bank of California v. San Francisco*, 142 Cal.

276;

*United States v. City State Bank* (D. C. Tenn.

1937) 19 Fed. Sup. 775;

*In re Donner-Hanna Coke Corp.* (1925) 209

N. Y. S. 62, 212 App. Div. 338 (affirmed 241

N. Y. 530, 150 N. E. 541);

- Wymore v. Markway (Mo.), 89 S. W. (2d) 9;  
Evers Woolen Co. v. Town of Gilsum. 146 Atl.  
511, 84 N. H. 1, 64 A. L. R. 1196;  
Clare v. Curron (1932) 52 R. I. 196, 159 Atl.  
835; [32]  
Ex Rel. Harding v. Hart, (1928) 332 Ill.  
467, 163 N. E. 769;  
Pullman Co. v. Suttles. (Ga. 1938), 199 S. E.  
821, 824;

The County Board of Equalization acts judicially in equalizing assessed values.

- People v. Goldtree, 44 Cal. 323;  
Birch v. County of Orange, Supra;  
Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235;  
Sec. 9, Art XIII, California State Constitution.  
Sections 1601 to 1615, Revenue and Taxation Code.

The right of appeal to the County Board of Equalization existed just the same as the right of appeal existed in the case of Arkansas Corporation Comm. and 51 County Tax Collectors of Arkansas, Petitioners, vs. Thompson, Supra.

Sections 1603, 1607 to 1610, incl., Revenue and Taxation Code.

There is a total similiarity of our County Assessor and Equalization Board's powers and functions with those of the Arkansas Corporation Commission as described in Arkansas Corp. Comm. v. Thompson,

Supra. Both the Assessor and the Board of Equalization are agencies created pursuant to state constitutional requirements.

Sections 1, 2, 3, 8, 8a, 9 10, 13, Art. XIII, Constitution.

Sections 71½, 12, 13, Art. XI Constitution.

Section 25, Art. IV, Subd. 10, Constitution.

Section 1603, 1608, 1609, Revenue and Taxation Code. (Board of Equalization.)

Sections 4013, 4314 and 904, Political Code, and Sections 453, 454, et seq. Revenue and Taxation Code (Assessor).

We refer counsel and the Court on all the points herein mentioned to the quotations from above cases and statutes and the full discussion in the Amicus Curiae brief of the County of Los [33] Angeles, and in the supplement to Point 1 of Amicus Curiae brief of County of Los Angeles on file in this Court in the matter of Santa Fe Distilleries Inc., a corporation, Bankrupt, Bankruptcy No. 32667-H, wherein Judge Hollzer rendered his opinion hereinbefore cited.

Respectfully submitted,

HAROLD W. KENNEDY,

County Counsel

By L. K. Voe,

Deputy County Counsel,

Attorney for John R. Quinn, County Tax Assessor,  
and H. L. Byram, County Tax Collector. [34]



Received Copy of the Within Suggestion this 19th day of December, 1946.

COBB & UTLEY,  
By /s/ FRANCIS B. COBB,  
Attorneys for Debtor.

[Endorsed]: Filed Oct. 27, 1947, Edmund L. Smith, Clerk; by F. Betz, Deputy.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW RE TAX CLAIM

The debtor herein having filed a verified petition for Order to Show Cause re Tax Claim requiring John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector, of Los Angeles County, to show cause why an order should not be entered determining the amount of taxes due said County of Los Angeles and an Order to Show Cause thereon having been regularly issued and the respondents named therein having filed a verified answer thereto admitting the rendering of the tax bill as alleged, denying that said assessment is in error, denying that said debtor did not own or have control of the personal property of such assessed valuation on said first Monday of March 1946, denying that it is necessary to fix or determine the amount of tax due and alleging six separate defenses, as follows:

- (1) That the court had no jurisdiction to reduce, alter or amend the assessed valuation of property for the reason that the assessments were

duly and regularly [36] made by the Assessor of Los Angeles County, according to law, and no objection was made before the County Board of Equalization, a quasi judicial body, and that said assessed valuation has become final under State law and has the force, finality and effect of a judgment;

- (2) That said court had no jurisdiction to reduce, alter, or amend the assessed valuations fixed by the County Assessor for the reasons that this was a proceeding under Chapter Eleven of the Bankruptcy Act and said taxes are secured by lien on real property of the debtor;
- (3) That the Court has no jurisdiction to reduce assessed valuations for the reason that the proceeding is under Chapter Eleven of the Bankruptcy Act and such taxes have priority claim;
- (4) That said taxes are not debts dischargeable in bankruptcy; the amount thereof has become fixed and final and cannot be questioned or considered in any State Court;
- (5) That said assessed valuation was based on a statement by said corporation debtor through its auditor under oath as required by Art. XIII, Sec. 8 of the California Constitution and said debtor is estopped to deny the same;
- (6) That said debtor operating its business under Chapter Eleven of the Bankruptcy Act pursuant to order of Court is liable for taxes the same as if conducting said business as individuals.

Respondents also filed written objections to the jurisdiction of said referee, claiming that he had no jurisdiction of the subject matter and no power to reduce or redetermine the [37] assessed valuation for County tax purposes, and the matter having come on regularly for hearing December 20, 1946, the debtor appearing by Cobb and Utley, by Francis Cobb, their attorneys, and respondents appearing by Harold W. Kennedy, County Counsel, and L. K. Voe, Deputy County Counsel, their attorneys, and a stipulation having been made as to the question involved, the matter was submitted as to the question of jurisdiction; on January 13th the matter was restored to the calendar and set for January 16th, at which time the objections to the jurisdiction were overruled and the Order to Show Cause was continued to February 24, 1947, for the taking of testimony; and respondents having filed a motion in the District Court for Leave to File a Petition for Writ of Prohibition and an Order to Show Cause having issued thereon, returnable February 19, 1947, before the Honorable J. F. T. O'Connor, District Judge, and the matter having been argued and the District Judge having written a Memorandum of Decision directing that a written order be made by the referee in respect to whether or not the referee had jurisdiction of the controversy, and the matter before the referee having been continued to June 17, 1947, the debtor appearing by Francis B. Cobb and the respondents by Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, the Court now makes the following Findings of Fact:

## FINDINGS OF FACT

The Court finds:

## I.

That on the first Monday in March 1946, the above named debtor was the owner of certain real and personal property;

## II.

That there existed on the first Monday in March 1946, a lien on said real property for the amount of tax thereafter assessed against said real and personal property; [38]

## III.

That on May 14, 1946, a declaration was made and verified on behalf of said debtor corporation by V. W. Nelson, auditor thereof, and thereupon filed with the Assessor of Los Angeles County as required by law; that said statement was introduced in evidence and shows that the value of the personal property in question for tax purposes was \$355,710.00; that it was and is contended by this debtor that said V. W. Nelson had no authority or authorization to file said declaration and that the values contained therein are incorrect;

## IV.

That on June 3, 1946, the above named debtor filed a petition under Chapter Eleven of the Bankruptcy Act and this court on said date entered an order permitting the debtor to remain in possession of its assets and to carry on its business under the supervision of this court; that by the filing of said petition this court acquired exclusive jurisdiction of the said debtor and its property, wherever located;



## V.

That the Board of Supervisors of Los Angeles County sits as a Board of Equalization on the first Monday in July and continuing until the business of equalization is disposed of, but not later than the third Monday in July; during such time a taxpayer has the right to appear in person or by agent and ask for an equalization or reduction in the assessed value of his property; that no appearance was made before said Board of Equalization in the year 1946 on behalf of said debtor;

## VI.

That after the filing of these proceedings respondents H. L. Byram, County Tax Collector, submitted a tax bill to the said debtor; that said tax bill shows the assessed valuation of the personal property in question to be \$355,710.00; that the [39] total tax, which is a lien on said real property, amounts to \$24,548.77; that the first installment thereof amounts to \$23,441.92, which installment includes the sum of \$22,333.25, which is the tax on said personal property;

## VII.

That the first installment of County taxes which includes half the tax on real property and the entire tax on secured personal property was claimed by the taxing agency to be due and payable November 1, 1946, and delinquent after 5 p.m. on December 5, 1946;

## VIII.

That on December 6, 1946, the debtor herein filed his Petition for Order to Show Cause in connection



with said tax claim; that the sole controverted allegation therein is that petitioner did not own or have control of any personal property of the assessed valuation of any sum in excess of \$148,880.00 on the first Monday in March, 1946;

### IX.

That said debtor owned and had control on the first Monday in March, 1946 of all the personal property listed in the declaration made in its behalf by V. W. Nelson, auditor, and assessed by the County Assessor; that the sole question before this court is the determination of the value of such property for county tax purposes on the first Monday in March, 1946;

### X.

That there are no conflicting liens involved herein; that there is no error of calculation in determining the tax claimed to be due by the County of Los Angeles.

From the Foregoing Findings of Facts the Court Makes the Following

## CONCLUSIONS OF LAW

### I.

That, at the time the aforesaid petition under Chapter Eleven of the Bankruptcy Act was filed in this proceeding, the assessment for County tax purposes on the personal property here involved had not become final, and that, if the said petition had not been filed, the debtor corporation could have applied to the Board of Supervisors of Los Angeles County, sitting as a Board of Equalization, for an

equalization or reduction of said assessment, and that, accordingly, this Court, ever since the filing herein of the said petition under Chapter Eleven of the Bankruptcy Act, has had and still has exclusive jurisdiction under section 64 (a) 4 and section 311 of the Bankruptcy Act to determine the value of the said personal property for County tax purposes.

Dated this 8th day of September, 1947.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 27, 1947, Edmund L. Smith, Clerk; by F. Betz, Deputy. [41]

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[Title of District Court and Cause.]

ORDER UPHOLDING JURISDICTION  
RE TAX CLAIM

It appearing that the debtor herein having filed its verified petition for Order to Show Cause re Tax Claim requiring John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector, of Los Angeles County, to show cause why an order should not be entered determining the amount of taxes due said County of Los Angeles and an Order to Show Cause thereon having been regularly issued and the respondents named therein having filed a verified answer thereto admitting the rendering of the tax bill as alleged, denying that said assessment is in error, denying that said debtor did not own or have control of the personal property of such assessed

valuation on said first Monday of March 1946, denying that it is necessary to fix or determine the amount of tax due and alleging six separate defenses, as follows:

- (1) That the Court had no jurisdiction to reduce, alter or amend the assessed valuation of property for the [42] reason that the assessments were duly and regularly made by the Assessor of Los Angeles County, according to law, and no objection was made before the County Board of Equalization, a quasi judicial body, and that said assessed valuation has become final under State law and has the force, finality and effect of a judgment;
- (2) That said Court had no jurisdiction to reduce, alter or amend the assessed valuations fixed by the County Assessor for the reasons that this was a proceeding under Chapter Eleven of the Bankruptcy Act and said taxes are secured by lien on real property of the debtor;
- (3) That the Court has no jurisdiction to reduce assessed valuations for the reason that the proceeding is under Chapter Eleven of the Bankruptcy Act and such taxes have priority claim;
- (4) That said taxes are not debts dischargeable in bankruptcy; the amount thereof has become fixed and final and cannot be questioned or considered in any State Court;
- (5) That said assessed valuation was based on a statement by said corporation debtor through its auditor under oath as required by Art. XIII,

Sec. 8 of the California Constitution and said debtor is estopped to deny the same;

- (6) That said debtor operating its business under Chapter Eleven of the Bankruptcy Act pursuant to order of Court is liable for taxes the same as if conducting said business as individuals;

And it appearing that respondents also filed written objections to the jurisdiction of said referee, claiming that he [43] had no jurisdiction of the subject matter and no power to reduce or redetermine the assessed valuation for County tax purposes, and the matter having come on regularly for hearing December 20, 1946, the debtor appearing by Cobb and Utley, by Francis Cobb, their attorneys, and respondents appearing by Harold W. Kennedy, County Counsel, and L. K. Voe, Deputy County Counsel, their attorneys, and a stipulation having been made as to the question involved, the matter was submitted as to the question of jurisdiction; on January 13th the matter was restored to the calendar and set for January 16, at which time the objections to the jurisdiction were overruled and the Order to Show Cause was continued to February 24, 1947, for the taking of testimony; and respondents having filed a motion in the District Court for Leave to File a Petition for Writ of Prohibition and an Order to Show Cause having issued thereon, returnable February 19, 1947, before the Honorable J. F. T. O'Connor, District Judge, and the matter having been argued and the District Judge having



written a Memorandum of Decision directing that a written order be made by the referee in respect to whether or not the referee had jurisdiction of the controversy, and the matter before the referee having been continued to June 17, 1947, the debtor appearing by Francis B. Cobb and the respondents by Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, the Court having made and filed herein its Findings of Facts and Conclusions of Law, now makes its order as follows:

I.

It Is Ordered, Adjudged and Decreed that the objections to the jurisdiction of this court of John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, be and the same are hereby overruled and denied. [44]

II.

It Is Further Ordered that said petition shall go off calendar pending review of this decision, to be re-set on the calendar by stipulation or by either party on reasonable notice.

Dated this 8th day of September, 1947.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed Oct. 27, 1947, Edmund L. Smith, Clerk; by F. Betz, Deputy. [45]



[Title of District Court and Cause.]

AFFIDAVIT FOR AND ORDER EXTENDING  
TIME WITHIN WHICH TO FILE PETI-  
TION FOR REVIEW

State of California,  
County of Los Angeles—ss.

Andrew O. Porter, being first duly sworn, on oath  
deposes and says:

That he is one of the attorneys for the respond-  
ents herein, John R. Quinn, County Assessor, and  
H. L. Byram, County Tax Collector, of Los An-  
geles County;

That said respondents feel aggrieved by the order  
entered herein by the Referee herein, Benno M.  
Brink, on the 8th day of September, 1947, and desire  
to file a petition for review to the United States  
District Court of said order made by said Referee  
on the 8th day of September, 1947.

Affiant further states that both he and his asso-  
ciates have had no opportunity to prepare said peti-  
tion for review due [46] to the pressure of other  
litigation and other work, and prays that an order  
be made herein by this Court extending the time  
within which respondents herein may file their peti-  
tion for review up to and including the 8th day of  
October, 1947.

/s/ ANDREW O. PORTER.

Subscribed and sworn to before me, this 17th day  
of September, 1947.

J. F. MORONEY,  
County Clerk.

By /s/ MARIE E. McPHERSON,  
Deputy.

ORDER

Good cause appearing therefor,

It is hereby ordered that the respondents herein, John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector, of Los Angeles County, shall be and are hereby granted up to and including the 8th day of October, 1947, within which to file their petition for review of the order made by this Court on the 8th day of September, 1947, to the United States District Court of this District in the above entitled proceeding.

Dated: September 17, 1947.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 27, 1947. Edmund L. Smith, Clerk; by F. Betz, Deputy. [47]

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[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S  
ORDER BY JUDGE

To Benno Brink, Esq., Referee in Bankruptcy:

The debtor herein having filed a verified petition on December 6, 1946, for Order to Show Cause re Tax Claim requiring John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector, of Los Angeles County, to show cause why an order should not be entered determining the amount of taxes due said County of Los Angeles and an Order to Show Cause thereon having been regularly issued and the

respondents named therein having filed a verified answer thereto admitting the rendering of the tax bill as alleged, denying that said assessment is in error, denying that said debtor did not own or have control of the personal property of such assessed valuation on said first Monday of March 1946, denying that it is necessary to fix or determine the amount of tax due and alleging six separate defenses, as follows:

1. That the court had no jurisdiction to reduce, alter or amend the assessed valuation of property for the reason [48] that the assessments were duly and regularly made by the Assessor of Los Angeles County, according to law, and no objection was made before the County Board of Equalization, a quasi judicial body, and that said assessed valuation has become final under State law and has the force, finality and effect of a judgment;
2. That said court had no jurisdiction to reduce, alter, or amend the assessed valuations fixed by the County Assessor for the reasons that this was a proceeding under Chapter Eleven of the Bankruptcy Act and said taxes are secured by lien on real property of the debtor;
3. That the Court had no jurisdiction to reduce assessed valuations for the reason that the proceeding is under Chapter Eleven of the Bankruptcy Act and such taxes have priority claim;

4. That said taxes are not debts dischargeable in bankruptcy; the amount thereof has become fixed and final and cannot be questioned or considered in any State Court;
5. That said assessed valuation was based on a statement by said corporation debtor through its auditor under oath as required by Art. XIII, Sec. 8 of the California Constitution and said debtor is estopped to deny the same;
6. That said debtor operating its business under Chapter Eleven of the Bankruptcy Act pursuant to order of Court is liable for taxes the same as if conducting said business as individuals.

Respondents also filed written objections to the jurisdiction of said referee, claiming that he had no jurisdiction of the subject matter and no power to reduce or redetermine the assessed [49] valuation for County tax purposes, and the matter having come on regularly for hearing December 20, 1946, the debtor appearing by Cobb and Utley, by Francis Cobb, their attorneys, and respondents appearing by Harold W. Kennedy, County Counsel, and L. K. Voe, Deputy County Counsel, their attorneys, and a stipulation having been made as to the question involved, the matter was submitted as to the question of jurisdiction; on January 13th the matter was restored to the calendar and set for January 16th, at which time the objections to the jurisdiction were overruled and the Order to Show Cause was continued to February 24, 1947, for the taking

of testimony; and respondents having filed a motion in the District Court for Leave to File a Petition for Writ of Prohibition and an Order to Show Cause having issued thereon, returnable February 19, 1947, before the Honorable J. F. T. O'Connor, District Judge, and the matter having been argued and the District Judge having written a Memorandum of Decision directing that a written order be made by the referee in respect to whether or not the referee had jurisdiction of the controversy, and the matter before the referee having been continued to June 17, 1947, the debtor appearing by Francis B. Cobb and the respondents by Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, the Court ruled it had jurisdiction and made the following Findings of Fact and Conclusions of Law in words and figures as follows (omitting the recital which is substantially as stated above):

### FINDINGS OF FACT

The Court finds:

#### I.

That on the first Monday in March 1946, the above named debtor was the owner of certain real and personal property;

#### II.

That there existed on the first Monday in March 1946, a [50] lien on said real property for the amount of tax thereafter assessed against said real and personal property;



## III.

That on May 14, 1946, a declaration was made and verified on behalf of said debtor corporation by V. W. Nelson, auditor thereof, and thereupon filed with the Assessor of Los Angeles County as required by law; that said statement was introduced in evidence and shows that the value of the personal property in question for tax purposes was \$355,710.00; that it was and is contended by this debtor that said V. W. Nelson had no authority or authorization to file said declaration and that the values contained therein are incorrect;

## IV.

That on June 3, 1946, the above-named debtor filed a petition under Chapter Eleven of the Bankruptcy Act and this court on said date entered an order permitting the debtor to remain in possession of its assets and to carry on its business under the supervision of this court; that by the filing of said petition this court acquired exclusive jurisdiction of the said debtor and its property, wherever located;

## V.

That the Board of Supervisors of Los Angeles County sits as a Board of Equalization on the first Monday in July and continuing until the business of equalization is disposed of, but not later than the third Monday in July; during such time a taxpayer has the right to appear in person or by agent and ask for an equalization or reduction in the assessed value of his property; that no appearance was made before said Board of Equalization in the year 1946 on behalf of said debtor;

## VI.

That after the filing of these proceedings respondents H. L. Byram, County Tax Collector, submitted a tax bill to the said [51] debtor; that said tax bill shows the assessed valuation of the personal property in question to be \$355,710.00; that the total tax, which is a lien on said real property, amounts to \$24,548.77; that the first installment thereof amounts to \$23,441.92, which installment includes the sum of \$22,333.25, which is the tax on said personal property;

## VII.

That the first installment of County taxes which includes half the tax on real property and the entire tax on secured personal property was claimed by the taxing agency to be due and payable November 1, 1946, and delinquent after 5 p.m. on December 5, 1946;

## VIII.

That on December 6, 1946, the debtor herein filed his Petition for Order to Show Cause in connection with said tax claim; that the sole controverted allegation therein is that petitioner did not own or have control of any personal property of the assessed valuation of any sum in excess of \$148,880.00 on the first Monday in March, 1946;

## IX.

That said debtor owned and had control on the first Monday in March, 1946, of all the personal property listed in the declaration made in its behalf by V. W. Nelson, auditor, and assessed by the

County Assessor; that the sole question before this court is the determination of the value of such property for county tax purposes on the first Monday in March, 1946;

X.

That there are no conflicting liens involved herein; that there is no error of calculation in determining the tax claimed to be due by the County of Los Angeles.

From the Foregoing Findings of Facts the Court Makes the Following

CONCLUSIONS OF LAW

I.

That, at the time the aforesaid petition under Chapter Eleven of the Bankruptcy Act was filed in this proceeding, the assessment for County tax purposes on the personal property here involved had not become final, and that, if the said petition had not been filed, the debtor corporation could have applied to the Board of Supervisors of Los Angeles County, sitting as a Board of Equalization, for an equalization or reduction of said assessment, and that, accordingly, this Court, ever since the filing herein of the said petition under Chapter Eleven of the Bankruptcy Act, has had and still has exclusive jurisdiction under section 64 (a) 4 and section 311 of the Bankruptcy Act to determine the value of the said personal property for County tax purposes.

Dated this 8th day of September, 1947.

BENNO M. BRINK,  
Referee in Bankruptcy.

And the Court made and entered its Order in words and figures as follows:

ORDER UPHOLDING JURISDICTION  
RE TAX CLAIM

It appearing that the debtor herein having filed its verified petition for Order to Show Cause re Tax Claim requiring John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector, of Los Angeles County, to show cause why an order should not be entered determining the amount of taxes due said County of Los Angeles and an Order to Show Cause thereon having been regularly issued and the respondents named therein having filed a verified answer thereto admitting the rendering of the tax bill as alleged, denying that said assessment is in error, denying that said debtor [53] did not own or have control of the personal property of such assessed valuation on said first Monday of March, 1946, denying that it is necessary to fix or determine the amount of tax due and alleging six separate defenses, as follows:

- (1) That the Court had no jurisdiction to reduce, alter or amend the assessed valuation of property for the reason that the assessments were duly and regularly made by the Assessor of Los Angeles County, according to law, and no objection was made before the County Board of Equalization, a quasi judicial body, and that said assessed valuation has become final under State law and has the force, finality and effect of a judgment;



- (2) That said Court had no jurisdiction to reduce, alter or amend the assessed valuations fixed by the County Assessor for the reasons that this was a proceeding under Chapter Eleven of the Bankruptcy Act and said taxes are secured by lien on real property of the debtor;
- (3) That the Court has no jurisdiction to reduce assessed valuations for the reason that the proceeding is under Chapter Eleven of the Bankruptcy Act and such taxes have priority claim;
- (4) That said taxes are not debts dischargeable in bankruptcy; the amount thereof has become fixed and final and cannot be questioned or considered in any State Court;
- (5) That said assessed valuation was based on a statement by said corporation debtor through its auditor under oath as required by Art. XIII, Sec. 8 of the California Constitution and said debtor is estopped to deny the same;
- (6) That said debtor operating its business under Chapter Eleven of the Bankruptcy Act pursuant to order of Court is liable for taxes the same as if conducting said business as individuals; [54]

And it appearing that respondents also filed written objections to the jurisdiction of said referee, claiming that he had no jurisdiction of the subject matter and no power to reduce or redetermine the assessed valuation for County tax purposes, and



the matter having come on regularly for hearing December 20, 1946, the debtor appearing by Cobb and Utley, by Francis Cobb, their attorneys, and respondents appearing by Harold W. Kennedy, County Counsel, and L. K. Voe, Deputy County Counsel, their attorneys, and a stipulation having been made as to the question involved, the matter was submitted as to the question of jurisdiction; on January 13th the matter was restored to the calendar and set for January 16, at which time the objections to the jurisdiction were overruled and the Order to Show Cause was continued to February 24, 1947, for the taking of testimony; and respondents having filed a motion in the District Court for Leave to File a Petition for Writ of Prohibition and an Order to Show Cause having issued thereon, returnable February 19, 1947, before the Honorable J. F. T. O'Connor, District Judge, and the matter having been argued and the District Judge having written a Memorandum of Decision directing that a written order be made by the referee in respect to whether or not the referee had jurisdiction of the controversy, and the matter before the referee having been continued to June 17, 1947, the debtor appearing by Francis B. Cobb and the respondents by Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, the Court having made and filed herein its Findings of Facts and Conclusion of Law, now makes its order as follows:

I.

It Is Ordered, Adjudged and Decreed that the objections to the jurisdiction of this court of John

R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, be and the same are hereby overruled and denied.

## II.

It Is Further Ordered that said petition shall go off calendar pending review of this decision, to be re-set on the calendar by stipulation or by either party on reasonable notice.

Dated this 8th day of September, 1947.

BENNO M. BRINK,  
Referee in Bankruptcy.

That said order is erroneous for the reason that the sole question before the Court is the determination of the value of the property for County tax purposes on the first Monday in March, 1946 (Finding of Fact IX); that the Court has no jurisdiction to make such determination or to reduce, alter or in any way amend the assessed valuation, for the following reasons:

## I.

That the assessed value of such property was determined by the County Assessor; that the County Assessor is a quasi-judicial officer; his assessment was regularly made in accordance with the Constitution and laws of the State of California, and is in the nature of a judgment. That said assessed value and the amount of the taxes based thereon have become final under State law and cannot now be questioned in any State court and have the force, finality and effect of a judgment.

## II.

That the assessed valuation was determined by the County Assessor and equalized by the County Board of Equalization in accordance with State law, and no appearance or objection was made before the County Board of Equalization, a quasi-judicial body, and the said assessed valuation and the amount of the tax [56] based thereon have become final under State law and have the force, finality and effect of a judgment.

## III.

That said debtor in possession, pursuant to order of court, operating its business under Chapter XI of the Bankruptcy Act, is liable for taxes and subject to the jurisdiction of the taxing authorities the same as if conducting said business as an individual.

## IV.

That the debtor in possession, pursuant to order of Court, and liable for said taxes failed to apply to the County Board of Equalization and to object to said assessment within the time allowed by law, although it had ample opportunity to do so, and is therefore estopped to question the same.

## V.

That the time to appear before the County Board of Equalization was not extended by any provision of the Bankruptcy Act; or if it was, the time has expired, and in any event the failure to appear before the Board of Equalization cannot confer jurisdiction on the bankruptcy court.

## VI.

That the Federal Court will not act until remedies provided by State law are exhausted, and no appearance or objection has been made by or on behalf of said debtor before the County Board of Equalization, which is the remedy provided by State law in such cases.

## VII.

That this is a proceeding under Chapter XI of the Bankruptcy Act and said taxes are secured by lien on real property of the debtor. [57]

## VIII.

That the proceeding is under Chapter XI of the Bankruptcy Act and such taxes have a priority claim.

## IX.

That said taxes are not debts dischargeable in bankruptcy and the amount thereof has become fixed and final and cannot be questioned or considered in any State court.

## X.

That no other declaration having been filed by the debtor corporation, as required by law, it cannot now question the authority of V. W. Nelson, admittedly its Auditor, to file the declaration in question and under State law it is immaterial that the values contained in said declaration are incorrect.

## XI.

That the Court should have sustained the objections and dismissed the debtor's petition because it has no jurisdiction to grant the relief prayed for in the debtor's petition as limited by the stipulation.

## XII.

That the Court should have sustained the objections and dismissed the debtor's petition because the debtor's petition does not state facts sufficient to raise a federal question within the jurisdiction of said Court to consider.

That for each and every one of the above-stated reasons said order is erroneous, and the objections to the jurisdiction should have been sustained and the debtor's position dismissed.

Wherefore, your petitioners pray for a review of the said [58] order by the Judge, and that the said order be vacated and set aside and that the Referee be directed to sustain the objections to the jurisdiction and to dismiss the petition of the debtor herein for order to show cause re tax claim with prejudice.

Dated: October 6, 1947.

JOHN R. QUINN,

County Assessor, and

H. L. BYRAM,

County Tax Collector.

By /s/ H. L. BYRAM.

HAROLD W. KENNEDY,

County Counsel, and

/s/ ANDREW O. PORTER,

Deputy County Counsel. [59]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 27, 1947. Edmund L. Smith, Clerk; By F. Betz, Deputy.



At a stated term, to wit: The September Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 31st day of December in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable J. F. T. O'Connor,  
District Judge.

[Title of Cause.]

This matter having heretofore come before the Court for hearing on petition of John R. Quinn, County Assessor, et al., for review of referee's order upholding jurisdiction re tax claims, and having been taken under submission and duly considered by the Court, the Court now causes its Decision to be filed and pursuant thereto, the Court holds that the objection to the jurisdiction should be overruled. [61]

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United States District Court, Southern District of  
California, Central Division

Bankruptcy No. 44,420 O'C

In the Matter of  
AERO SERVICES, INC., a corporation,  
Debtor.

[Notation]: Notified All—Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, of Los Angeles,

attorneys for John R. Quinn, County Assessor and H. L. Byram, County Tax Collector, Petitioners on Review; Hugo A. Steinmeyer and John E. Walter, of Los Angeles, attorney for Bank of America, Petitioner on Review; Francis Cobb of Cobb & Utley, of Los Angeles, attorney for Debtor. O'Connor, J. F. T., Judge.

### OPINION

The above entitled matter was before this court on a prior hearing. At that time the County Assessor, John R. Quinn, and H. L. Byram, the County Tax Collector, of Los Angeles County, filed petitions for a Writ of Prohibition praying that same be directed to the Honorable Benno M. Brink, Referee in Bankruptcy, prohibiting him from proceeding to re-determine, amend, or alter the assessed valuation of the property of the Aero Services Inc., a California corporation, the debtor corporation, as fixed by the County Assessor; and prohibiting him from otherwise proceeding in excess of his jurisdiction in the matter of said tax claim.

On January 16, 1947, the Referee announced his conclusion that he had jurisdiction, overruled the objection to the jurisdiction, but refused to make an Order from [62] which an appeal would lie, and continued the matter to February 24 for the taking of testimony. The petitioners alleged that unless the Honorable Benno M. Brink is restrained, he will take testimony and re-determine the assessed valuation of said property.

The Referee overruled the objection to the jurisdiction.

This Court, on May 21, 1947, concluded as follows:

“It is the opinion of the court that the Referee Benno M. Brink, should enter a written Order, either sustaining or denying jurisdiction, and that after the entry of said Order, either party may appeal.”

On September 8, 1947, Benno M. Brink, Referee in Bankruptcy, filed in this court, pursuant to said direction, Findings of Fact and Conclusions of Law. Finding of Fact IX was as follows:

“That said debtor owned and had control on the first Monday in March, 1946, of all the personal property listed in the declaration made in its behalf by V. W. Nelson, auditor, and assessed by the County Assessor; that the sole question before this court is the determination of the value of such property for county tax purposes on the first Monday in March, 1946;”

The Referee's Conclusions of Law were as follows:

“That, at the time the aforesaid petition under Chapter Eleven of the Bankruptcy Act was filed in this proceeding, the assessment for County tax purposes on the personal property here involved had not become final, and that, if the said petition had not been filed, the debtor corporation could have applied to the Board of Supervisors of Los Angeles County, sitting as a Board of Equalization, for an equalization or reduction of said assessment, and that, [63] accordingly, this Court, ever since the filing

herein of the said petition under Chapter Eleven of the Bankruptcy Act, has had and still has exclusive jurisdiction under section 64 (a) 4 and section 311 of the Bankruptcy Act to determine the value of the said personal property for County tax purposes.”

The Court has examined the file and concludes as follows:

On the first Monday in March, 1946, the debtor herein was the owner of certain real and personal property. On May 14, 1946, a declaration for county tax purposes was made and verified on behalf of the debtor by one V. W. Nelson, its auditor, and the same was thereupon filed with the County Assessor; said statement shows that the value of the debtor's personal property was \$355,710.00 as of the first Monday in March, 1946. Thereafter, on an undisclosed date, the County Assessor valued the said personal property for county tax purposes at said sum of \$355,710.00.

On June 3, 1946, the debtor commenced this proceeding by filing herein its petition under Chapter XI of the Bankruptcy Act and, on the same date, appropriate orders were made herein permitting it to remain in possession of its assets and to continue the operation of its business under the control of this Court. The said petition under Chapter XI of the Bankruptcy Act is still pending, but no order has thus far been entered confirming the debtor's plan of arrangement with its creditors. The debtor still continues in possession of its assets, but all of its business operations have been suspended.



In the latter part of 1946, the debtor received from the County Tax Collector a tax bill covering the taxes on its real and personal property as of the first Monday in [64] March, 1946. Thereafter, on an undisclosed date, the County Assessor valued the said personal property for county tax purposes at said sum of \$355,710.00.

On June 3, 1946, the debtor commenced this proceeding by filing herein its petition under Chapter XI of the Bankruptcy Act and, on the same date, appropriate orders were made herein permitting it to remain in possession of its assets and to continue the operation of its business under the control of this Court. The said petition under Chapter XI of the Bankruptcy Act is still pending, but no order has thus far been entered confirming the debtor's plan of arrangement with its creditors. The debtor still continues in possession of its assets, but all of its business operations have been suspended.

In the latter part of 1946, the debtor received from the County Tax Collector a tax bill covering the taxes on its real and personal property as of the first Monday in March of said year. Said taxes became a lien on the real property of the debtor as of such first Monday in March. The said tax bill shows the assessed value of the personal property of the debtor to be the aforesaid sum of \$355,710.00 and that the amount of the tax thereon is the sum of \$22,333.25.

On December 6, 1946, the debtor filed herein its petition for an order to show cause requiring the County Assessor and the County Tax Collector to



show cause why the Referee should not determine the amount of taxes due by it to the County of Los Angeles and why the Referee should not direct the debtor as to the manner and time of payment of such taxes. An order to show cause being issued on the said petition, the Assessor and the Tax Collector, in due course, filed their answer thereto and also their objections to the jurisdiction of the Referee to proceed in the premises. [65]

After a hearing the Referee made an oral ruling overruling the objections to the jurisdiction and directing that the hearing proceed on the merits.

Thereupon a Motion for Permission to File Petition for Writ of Prohibition was filed by the claimant and upon the hearing thereon an Order was made on May 21, 1947 directing the Referee to enter a written order upon his said determination on the jurisdictional controversy. Such an order was made on September 8, 1947, and thereafter this matter came before this Court upon the Petition for Review by the County Assessor and County Tax Collector.

The debtor's original Order to Show Cause to determine the amount of taxes due the County of Los Angeles still pends before the Referee awaiting the determination there of the power, right, and jurisdiction of the Referee to ascertain and determine the tax in question.

The tax in question was an obligation of the debtor as of a date prior to the filing of the Chapter XI proceedings. It was not an obligation within the classification of administration expenses since it arose on the first Monday of March, 1946, and prior

to the proceeding under Chapter XI, and in so far as we are concerned, the claimant was a creditor with a provable claim in bankruptcy proceedings. This was not a claim coming into being as a result of the operation of a business by a receiver, trustee, or as here, the debtor in possession. *Boteler v. Ingals*, 308 U. S. 57.

The question to be answered is: "Does the Referee have jurisdiction to pass upon the amount of tax claim which the debtor maintains is grossly excessive?"

Section 64a (4) of the Bankruptcy Act provides:

"... in case any question arises as to the [66] amount or legality of any taxes, such question shall be heard and determined by the court."

Following the amendment to the Bankruptcy Act (Chandler Act effective September 22, 1938) the tax agencies were placed upon the same general basis as all other claims. The taxing agencies were required to file their claims in the manner of and within the time fixed for other claims. Prior to the said amendment, the Referee in ordering the disbursement of the funds of the bankruptcy estate was admonished by the prior Section 64a as follows:

"The Court shall order the trustees to pay all taxes legally due and owing by the bankrupt . . ."

and under this statute the law as developed by many cases uniformly held that the bankruptcy court had not only the duty but also the power and jurisdiction to hear and determine the matter of the amount of

tax "legally due." In fact, the bankruptcy services and text books treated the subject as a settled condition of the law of bankruptcy distribution and we observe that many of the state taxing statutes were cast with this power of the bankruptcy court in contemplation. For example, Section 18649 (California State Personal Income Tax) provides:

"Upon bankruptcy . . . any deficiency . . . may be immediately assessed."

and Section 18651:

"Claims for deficiency . . . may be presented, for adjudication in accordance with the law, to the court before which the bankruptcy . . . is pending, despite the pendency of proceedings for the redetermination of the deficiency pursuant to a petition to the board. No petitions for re-determination may be filed with the board after the adjudication of the bankruptcy . . ."

Approximately the same language appears in Section 19(i) of the State Compensation Income Tax [67] Act and under the State Bank and Corporation Franchise Tax Act.

Section 25(i).

"Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding . . . any deficiency . . . determined by the commission may be immediately assessed . . . claims for deficiency . . . may be presented for adjudication in accordance with law to the court before which the bankruptcy . . . is pending despite

the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the State Board of Equalization but no petition for any such redetermination shall be filed with said board after the adjudication of bankruptcy.”

Some reported cases went so far as to indicate that the bankruptcy court could redetermine the question as to the amount and legality of the tax after the same had been passed upon by the state tax board or agency. See numerous cases cited in Vol. 3, Colliers on Bankruptcy, 14 ed. page 2146-7, note 13. But the rule was otherwise where the determination had been made by a state or federal court. Page 2149, note 19.

The indicated power being apparently superior to the ancient doctrine of the invulnerability of the principle of *res adjudicata*.

This questionable extension no doubt prompted two recent Supreme Court decisions: *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132, and *Gardner v. New Jersey*, 328 U. S. 850; 152 F. (2) 408; 329 U. S. 565, 91 L. Ed. Adv. P 410 (1-20-1947).

Prior thereto the Supreme Court had supported the doctrine announced many times by the majority of the Circuit Courts that the bankruptcy court had the power to fix and determine the amount and legality of tax claims. *New Jersey v. Anderson*, 203 U. S. 483. [68]

The case of *In the Matter of Gustav Schaefer Company, Bankrupt*, 103 F. 2d 237 (Cert. denied



308 U. S. 579) 6th Circuit, was determined prior to the first Supreme Court case of *Arkansas Corporation Commission vs. Thompson*. *Supra*. In speaking of the power of the bankruptcy court to pass upon the matter of taxes (Sec. 64a “. . . in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court . . .”):

“The economic justification of the statute and its validity is fully set out and sustained in the following cases: *Whitney v. Dresser*, 200 U. S. 532, 536, 15 Am. B. R. 326, 26 S. Ct. 316, 50 L. Ed. 584; *New Jersey v. Anderson* 203 U. S. 483, 495, 17 Am. B. R. 63, 27 S. Ct. 137, 51 L. Ed. 284; *Van Huffel v. Harkelrode*, *Treas.*, 284 U. S. 225, 231, 18 Am. B. R. (N. S.) 730, 52 S. Ct. 115, 76 L. Ed. 256, 78 A. L. R. 453; *Truman v. Thalheimer* (C. C. A. 9th Cir.) 19 F. (2d) 468; *In re De Angeles* (C. C. A. 10th Cir.), 15 Am. B. R. (N. S.) 274, 36 F. (2d) 218; *Henderson County v. Wilkins* (C. C. A., 4th Cir.), 16 Am. B. R. (N. S.) 359, 43 F. (2d) 670; *In re Clayton Magazines* (C. C. A., 2nd Cir.), 29 Am. B. R. (N. S.) 97, 77 F. (2d) 852; *City of Springfield v. Hotel Charles Co.* (C. C. A., 1st Cir.), 31 Am. B. R. (N. S.) 604, 84 F. (2d) 589; *Dickson v. Riley* (C. C. A., 8th Cir.), 32 Am. B. R. (N. S.) 279, 86 F. (2d) 385; *Board of Directors St. Francis Levee Dist. v. Kurn* (C. C. A. 8th Cir.), 34 Am. B. R. (N. S.) 523, 91 F. (2d) 118; *In re Lang Body Co.* (C. C. A. 6th Cir.), 35 Am. B. R. (N. S.) 35, 92 F. (2d) 338.”



Likewise the 9th Circuit in the case of *United States v. Coast Wineries, Inc.*, 131 Fed. 2d 643, determined:

“The jurisdiction of the bankruptcy court over the subject matter of taxes is specifically granted by the [69] Bankruptcy Act Section 64, sub. (a), as amended, 44 Stat. 662, 666, 11 U. S. C. A. Section 104, sub. (2), which, among other things, provides that ‘The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States.’ This language necessarily implies that in controverted matters the court must judicially determine the amount of the tax due.”

See *Referees 8 Corpus Juris Sec. Pg. 976 in re De Angeles* 36 F. (2) 218.

However, applying the doctrine of the said two recent Supreme Court cases solely to the factual situations therein, we find that the distinction rests upon the doctrine of *res adjudicata* in that the Supreme Court determined that the two agencies fixing the taxes were quasi-judicial bodies and that the proper respect and sanction should be accorded their determinations. On both occasions the court pointed out that the bodies were not ministerial but were quasi-judicial with a noticed hearing, production of witnesses prior to ascertainment of the tax, the right of review and appeal, etc. And as to its former decision of *New Jersey v. Anderson*, 203 U. S. 483, Justice Black, for the court, said that where “A state agency, with-

out a hearing, imposed a tax . . . we do not think it was the intention of Congress to conclude the Bankruptcy Courts by the findings of boards of this character . . . But the Arkansas Corporation Commission does not act ministerially. On the contrary, it is a quasi-judicial agency entrusted with wide responsibilities . . .”

Following the decision in the Arkansas case, it is interesting to observe the impression which was made upon the lower Federal Courts.

*Middlekamp v. Lea Trust (In re Ingersoll Co.)*, 148 F. 2d 282, 10th Circuit, determined that where taxes had been assessed no effort had been made in the manner and within the time prescribed by state law for correction of errors [70] or inequalities in valuation of the property and the assessment had become final, the taxes were then legally due and owing within the meaning of Section 64a of the Bankruptcy Act and the provisions of said section did not authorize or empower the bankruptcy court to revise and redetermine in respect of valuation an assessment made under warrant of state law.

In the case of *Baumann v. Sheehan*, 140 Fed. 2d 747, 8th Circuit, a determination was that the Bankruptcy Court had only that power which a state court had in equity to review the tax and that as a Missouri Court would not have the power to review the tax neither would the court of bankruptcy. “If the rule were otherwise, it would make the bankruptcy court a ‘super-assessment tribunal’ over

the state taxing agencies which broad power was not intended to be conferred by Congress. *Arkansas Corporation Commissioner v. Thompson, supra.*”

*Commonwealth of Pennsylvania v. Aylward*, 154 Fed. 2d 714, 8th Circuit: “At the time the claim was considered by the Bankruptcy Court the assessments had become final, and so far as the Pennsylvania law is concerned they were legally due and owing. The provision in Section 64a does not authorize or empower the Bankruptcy Court to revise and re-determine in respect to valuation an assessment made pursuant to state law. . . . The tax payer, having failed to seek relief in the administrative or quasi-judicial tribunals of Pennsylvania and the remedies they afford, cannot we think, seek the aid of the Bankruptcy Court under the provisions of Section 64a of the Bankruptcy Act.”

On the other hand, other circuits have taken the pronouncements of the *Arkansas* and *Gardner* cases only in their [71] most direct application to the respective factual conditions therein contained and have called attention to what may be a much narrower application, that is the lack of power and jurisdiction in the bankruptcy court to question the amount or legality of those taxes which have been thereto ascertained by a quasi-judicial body at a quasi-judicial hearing. In other words the application of *res adjudicata* was resorted to and a second hearing was prohibited. The enunciation of this doctrine was in no doubt salutary and much to be desired. The prohibition of rehearing, re-examination, etc. was quite proper in an orderly judicial

process where the issue had been ascertained by a proper body or agency having the power to hold hearings on notice, require the production of witnesses and the power to make ultimate findings and order on the tax, subject only to the right of appeal, and thus bind all parties.

The minimum requirement apparently would be a determination by a quasi-judicial body in conjunction with quasi-judicial hearing, or at least the right to such hearing.

The Second Circuit in a well-reasoned case, *Lyford vs. State of New York*, 137 Fed. 2d 782, discusses its views of the condition of the law following the Supreme Court's decision in the Arkansas case:

“Prior to the decision of *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132, 45 Am. B. R. (N. S.) 462, 61 S. Ct. 888, 85 L. Ed. 1244, the great majority of the decisions had upheld a wide power in the bankruptcy court to review and redetermine local taxes under Sec. 64 (a) or its predecessor. These cases relied in substance upon *State of New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 63, 27 S. Ct. 137, 51 L. Ed. 284, where such a redetermination by the [72] Bankruptcy Court of a New Jersey tax had been upheld. See 3 Collier, *op. cit. supra*, pp. 2145, 2146, and citations; and *cf. Dickinson v. Riley* (C. C. A. 8th Cir.), 32 Am. B. R. (N. S.) 279, 86 F. (2d) 385; *In re General Film Corp.* (C. C. A., 2nd Cir.), 29 Am. B. R. (N. S.) 97, 77 F. (2d) 852.



There had been, however, a minority view, of which perhaps the leading examples were *In re Gould Mfg. Co.* (D. C., E. D. Wis.), 29 Am. B. R. (N. S.) 733, 11 F. Supp. 644 (noted with approval in 45 Yale L. J. 734), and *In re 168 Adams Bldg. Corp.* (C. C. A. 7th Cir.), 40 Am. B. R. (N. S.) 754, 105 F. 704, certiorari denied *Steinbrecher v. Toman*, 308 U. S. 623, 60 S. Ct. 378, 84 L. Ed. 520. See, also, 50 Yale L. J. 165, stating the arguments against restriction of the state's taxing rights in criticism of *In re Missouri Pac. R. Co.* (D. C., E. D. Mo.), 43 Am. B. R. (N. S.) 141, 33 F. Supp. 728, which was later affirmed, *Arkansas Corporation Commission v. Thompson* (C. C. A., 8th Cir.), 44 Am. B. R. (N. S.) 536, 116 F. (2d) 179, but was reversed by the Supreme Court in the case first cited. There is no doubt that the Supreme Court's decision renders many at least of the earlier cases no longer valid precedents, or that it considerably restricts interference by the bankruptcy with state-taxing powers."

"There were two major questions before the Supreme Court in that case: first, whether Sec. 64 (a) applies in railroad reorganization proceedings, and second, whether if applicable it allowed redetermination of a tax finally settled by state authorities. The first was expressly left undecided by the court."

"Our present problem, however, is not the determination of priorities, but merely the extent of power of the bankruptcy court to decide



upon tax claims. . . . On the other hand, the effect of the Thompson case is, in any event, to restrict [73] the court to finding if the tax is legally due and to deny it power to review the action of a quasi-judicial taxing body in setting, after due hearing, a valuation of property for tax purposes. We conclude, therefore, that the court below did have power to decide whether the claimed tax was 'legally due.'

"There still remains the major question of the extent of that power as applied to the present circumstances. And here what seems the probable limitations of the Thompson case, as ably pointed out by Professor Moore, 3 Collier, op. cit. supra, pp. 2164-2167, becomes important. In that case the court distinguishes the Anderson case, because in the latter the New Jersey tax assessors acted only in a ministerial capacity, while the Arkansas Commission acted in a quasi-judicial capacity and had finally settled the tax upon the participation of the trustee, who then did not take the appeal provided by the state law. Hence in the Thompson case the assessment of the tax had become *res adjudicata* by virtue of the state proceedings when the bankruptcy court assumed the power to consider it. Moreover, the question involved was that of valuation of the property of the railroad in the state—a matter the courts generally would not review on appeals from administrative bodies and which the court concluded Congress did not intend should be reviewed in

bankruptcy. In other words, the decision concerns a tax finally settled without appeal by the state authorities and an attack not on issues of legality, but on issues of valuation. Review in such a case involves the upsetting of state-taxing activities in ways beyond that permitted as to administrative action generally, as had been pointed out by commentators and as was held by the Supreme Court.” [74]

The Third Circuit in the case entitled *In re Monongahela Rye Liquors, Inc.*, 1441 F. 2d 864 in 1944, in referring to the amendment of Section 64a by the Chandler Act states:

“The Chandler Act, to which the instant case is subject, not only appears not to have taken away or restricted whatever may have been a bankruptcy court’s jurisdiction to redetermine tax claims, but, on the contrary, seems to indicate more clearly the existence of the power.”

“(1) Generally speaking, therefore, we think that a bankruptcy court has the power to redetermine tax claims in the exercise of its jurisdiction under the Chandler Act. But we also think that certain factual determinations in respect of such claims, when competently made in another forum, may be conclusive at a hearing thereon in a bankruptcy court. Such we believe is indicated by a comparative reading of the decisions in *New Jersey v. Anderson*, and *Arkansas Corporation Commission v. Thompson*, *supra*.”

“(2) The view we take of the decision in the Thompson case is that where, after a hearing, a quasi-judicial body, thereunto duly empowered, determines the amount of a tax due, with the right on the part of the taxpayer to a judicial review of the determination, all conformable with the requirements of due process, such determination, upon becoming final by operation of law, is conclusive upon a court of bankruptcy save for mathematical error in the computation of the amount of the tax or legal error in its assessment. Cf. *In re 168 Adams Building Corporation*, D. C., 27 F. Supp. 247, 249, 250, affirmed sub nom. *Steinbrecher v. Toman*, 7 Cir., 105 F. 2d 704, certiorari denied 308 U. S. 623, 60 S. Ct. 378, 84 L. Ed. 520; *In re Schach*, D. C., 17 F. Supp. 437, 438, 439; *In re Gould Mfg. Co.* D. C., 11 F. Supp. 644, 649. In *Lyford, v. City of New York*, 137 [75] F. 2d 782, 786, the Court of Appeals for the Second Circuit said that ‘. . . the effect of the Thompson case is, in any event, to restrict the court to finding if the tax is legally due and to deny it power to review the action of a quasi-judicial taxing body in setting, after due hearing, a valuation of property for tax purposes.’ And, again, *In re Hotel Martin Co. of Utica*, D. C., 41 F. Supp. 392, 394, it was said that ‘The Arkansas case, supra, illustrates the law relative to real property assessments by state or local authorities where the review of the assessments as provided by law was not taken.’

“(3) The question in any instance, therefore, is whether the circumstances necessary to justify any exercise of bankruptcy’s power to redetermine a tax claim are present. We think they are in the instant case. The tax payer having failed to file a return, the tax assessments against it were based upon estimated ‘settlements’ arbitrarily made by the state’s Department of Revenue without hearing the tax payer.”

In the instant case the time for objection to the assessment before the Board of Equalization had not expired at the time of the within bankruptcy proceeding. There had been no hearing, finding or final order on the tax at the time of bankruptcy and it therefore appears that the determination of the amount of tax may be had in these pending bankruptcy proceedings, and accordingly this Court determines that the objection to the jurisdiction should be overruled.

It Is So Ordered.

Dated at Los Angeles, California this 31st day of December, 1947.

/s/ J. F. T. O’CONNOR,  
Judge.

[Endorsed]: Filed Oct. 31, 1947. [76]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO  
CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, petitioners herein, appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order Overruling Objections to the Jurisdiction Re Tax Claims entered in this matter on December 31, 1947, and from the whole thereof.

Dated: January 29, 1948.

HAROLD W. KENNEDY,  
County Counsel, and  
/s/ ANDREW O. PORTER,  
Deputy County Counsel,  
Attorneys for Petitioners.

[Endorsed]: Filed and mailed copy to Cobb & Utley, Attorneys for Debtor, Jan. 29, 1948. [77]



[Title of District Court and Cause.]

### UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Aero Services Inc., debtor in the above entitled matter, in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to be paid to the said Aero Services Inc., its successors or assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, John R. Quinn, Los Angeles County Assessor, and H. L. Byram, Los Angeles County Tax Collector, have appealed or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order overruling the objection of John R. Quinn, Los [78] Angeles County Assessor, and H. L. Byram, Los Angeles County Tax Collector, to the jurisdiction of the Bankruptcy Court regarding tax claims, made and entered on December 31st, 1947 by the United States District Court for the Southern District of California, Central Division, in the above entitled action.

Now, Therefore, if the above named Appellant, John R. Quinn and H. L. Byram, Assessor and Tax

Collector respectively, shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the Order affirmed, or such costs as the Appellate Court may award if the Order is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation, and award execution thereon.

Signed, sealed and dated this 29th day of January, 1948.

FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,

By /s/ ROBERT HECHT,  
Attorney in Fact.

Attest:

/s/ S. M. SMITH,  
Agent.

Examined and recommended for approval as provided in Rule 8.

HAROLD W. KENNEDY,  
County Counsel,

By /s/ ANDREW O. PORTER,  
Deputy.

State of California,  
County of Los Angeles—ss.

On this 29th day of January, 1948, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in-Fact, and S. W. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

/s/ THERESA FITZGIBBONS,  
Notary Public in and for the County of Los Angeles,  
State of California.

My Commission Expires May 3, 1950.

[Endorsed]: Filed Jan. 29, 1948. [79]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANTS INTEND TO RELY

The points upon which appellants intend to rely on this appeal are as follows:

I.

That the order of the District Court was erroneous in affirming the order of the Referee and overruling appellants' objection that the Bankruptcy Court has no jurisdiction to review the amount of an assessment to redetermine the assessed valuation of property for County tax purposes where such value has been determined under valid state law by a quasi-judicial agency.

II.

That said order was erroneous because the assessed valuation and the assessment were regularly determined by the County Assessor, a quasi-judicial officer, in accordance with the Constitution and laws of the State of California, with [80] opportunity for quasi-judicial review thereof; and such assessed valuation and such assessment have the force, finality and effect of a judgment and have become final and could not have been questioned in any state court at the time of filing herein of the debtor's petition to redetermine such assessed valuation.

III.

That said order was erroneous because the assessed valuation was determined and the assessment fixed by the County Assessor and equalized by the

County Board of Equalization, a quasi-judicial body, in accordance with State law and no complaint of want of equalization or application for equalization or complaint of over-assessment or other objection to the assessment having been made before the County Board of Equalization, said assessment and assessed valuation and the amount of tax based thereon had become final under State law and had the force, finality and effect of a judgment before the time of filing of the debtor's petition herein to redetermine assessed valuation.

#### IV.

Said order was erroneous because even if the time to appear before the Board of Equalization had been extended by the filing of the Petition under Chapter XI or by any provision of the Bankruptcy Act, the time to appear had expired, no appearance had been made and the assessment and the assessed value as made and determined by the County taxing authorities had become final.

#### V.

Said order was erroneous because the Bankruptcy Court lacked jurisdiction itself to determine the assessed value of property for County tax purposes even if the assessment and [81] the determination of assessed valuation by the County taxing authorities had not become final.

#### VI.

That said order was erroneous because the debtor herein in possession, pursuant to order of Court, operating its business under Chapter XI of the



Bankruptcy Act, failed to exhaust the remedies provided by State law, failed to apply to the County Board of Equalization or to object to said assessment or said assessed valuation within the time allowed by law, although it had ample opportunity to do so, or within the time as extended by any provision of the Bankruptcy Act, but allowed the assessment to become final and the tax to become delinquent; that the determination by the County Assessor as equalized by the County Board of Equalization is now *res adjudicata* and the debtor is concluded thereby and estopped to question the same.

#### VII.

That said order was erroneous because in a Chapter XI proceeding the Bankruptcy Court lacks jurisdiction to redetermine the assessed valuation as determined by the County Assessor where the tax based thereon is secured by lien on real estate, is entitled to priority and is not dischargeable in bankruptcy.

#### VIII.

That said order was erroneous because the tax here involved is secured by a valid and existing lien antedating the adjudication and all proceedings herein in bankruptcy and is not affected thereby.

#### IX.

That said order was erroneous because the assessment was based on a declaration filed by the debtor corporation as [82] required by the Constitution and laws of California; no other declaration having been filed, the debtor is estopped to deny the authority

of its auditor to file the same and it would be immaterial if the values contained therein were excessive or erroneous.

X.

That said order was erroneous because the Court had no jurisdiction to grant the relief prayed for in the debtor's petition as limited by the debtor's stipulation that the sole question before the Referee was the determination of the value of such property for County tax purposes on the first Monday in March, 1946. (Finding IX of the Referee.)

XI.

Said order was erroneous because the debtor's petition does not state facts sufficient to raise a federal question within the jurisdiction of the Bankruptcy Court to consider.

Dated January 29, 1948.

HAROLD W. KENNEDY,

County Counsel, and

/s/ ANDREW D. PORTER,

Deputy County Counsel,

Attorneys for John R. Quinn, County Assessor, and

H. L. Byram, County Tax Collector of Los Angeles County, Appellants. [83]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 29, 1948. [84]

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[Title of District Court and Cause.]

DESIGNATION OF RECORD

Appellants designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Petition for Order to Show Cause in Connection with Tax Claim, filed December 6, 1946.
2. Answer to Petition for Order to Show Cause in Connection with Tax Claim, filed December 18, 1946.
3. Suggestion of Lack of Jurisdiction of Subject Matter, filed December 20, 1946.
4. Findings of Fact and Conclusions of Law Re Tax Claim, filed September 8, 1947.
5. Order Upholding Jurisdiction Re Tax Claim, filed September 8, 1947.
6. Petition for Review of Referee's Order by Judge filed October 6, 1947. [85]
7. Referee's Certificate on Petition for Review of Order Upholding Jurisdiction Re Tax Claims, filed October 27, 1947.
8. Order of the District Judge entered December 31, 1947.
9. Notice of Appeal.
10. Statement of Points on which Appellants intend to rely.
11. This Designation.

Dated: January 29, 1948.

HAROLD W. KENNEDY,  
County Counsel, and  
/s/ ANDREW O. PORTER,  
Deputy County Counsel,  
Attorneys for Petitioners.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 29, 1948. [86]

[Title of District Court and Cause.]

**MOTION TO EXTEND TIME FOR FILING  
RECORD AND DOCKETING APPEAL**

Come now John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, appellants herein, and show:

- (1) Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was filed herein on the 29th day of January, 1948.
- (2) On January 29, 1948, appellants filed their designation of record on appeal herein.
- (3) The clerk has been unable to complete the preparation of the record on appeal herein and will be unable to complete the same within the period of forty days from the date of filing of such notice of appeal for the reason that appellants have just learned that the order of the Judge dated December 31, 1947 has never been entered in the civil docket, pursuant to Rule 58, Rules of Civil Procedure, although apparently entered [88] in the docket pursuant to Order No. 1, General Orders in Bankruptcy, and appellants desire to have a new order signed and entered in accordance with Rule 58, and to use the same record on appeal from such new order, and it is therefore necessary to secure an extension of time to prepare the record.

Wherefore, appellants move the court for an order extending the time within which the record on appeal may be filed and the appeal docketed in said Circuit Court of Appeals to and including April 28, 1948.

Dated: March 8, 1948.

HAROLD W. KENNEDY,  
County Counsel, and  
/s/ ANDREW O. PORTER,  
Deputy County Counsel,  
Attorneys for Appellants.

[Endorsed]: Filed March 8, 1948. [89]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

Motion having been made by John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, appellants herein, for an order extending time for filing record and docketing appeal in the Circuit Court of Appeals; and it appearing that the time will expire on March 9, 1948, unless extended, and good cause appearing therefor:

It is hereby ordered that the time for docketing appeal of John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles



County, in the Circuit Court of Appeals, and for filing the record therein, is hereby extended to and including April 26, 1948.

Dated: the 8th day of March, 1948.

J. F. T. O'CONNOR,  
Judge.

Presented by

/s/ ANDREW O. PORTER,  
Deputy County Counsel.

[Endorsed]: Filed March 8, 1948. [90]

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[Title of District Court and Cause.]

ORDER OF JUDGE AFFIRMING ORDER OF  
REFEREE IN RE TAX CLAIM AND  
OVERRULING OBJECTIONS TO THE  
JURISDICTION

John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, having filed on October 6, 1947, a petition for review of the order of the Honorable Benno M. Brink, Referee in Bankruptcy, entered September 8, 1947, upholding jurisdiction re tax claims; and the Referee having filed herein in his certificate on petition for review dated October 27, 1947, together with his findings of fact and conclusions of law and order, and other papers material thereto; and the matter coming on regularly for hearing; and points and authorities having been filed in support of said petition for review, and by the debtor

in reply thereto; and oral argument having been waived; and the Court being fully advised in the premises, the Court adopts the Findings of Fact and Conclusions of Law made by the Referee and makes its order as follows:

It is ordered, adjudged and decreed that the order of the Referee entered September 8, 1947, upholding jurisdiction re tax claims is sustained and affirmed and the objections to the jurisdiction are overruled.

Dated: March 26, 1948.

/s/ J. F. T. O'CONNOR,  
Judge.

Approved as to form:

COBB & UTLEY,  
By /s/ FRANCIS B. COBB,  
Attorneys for Debtor.

HAROLD W. KENNEDY,  
County Counsel, and  
/s/ ANDREW O. PORTER,  
Deputy County Counsel.

Attorneys for John R. Quinn, County Assessor, and  
H. L. Byram, County Tax Collector of Los Angeles County.

[Endorsed]: Filed, Judgment entered and Docketed Mar. 26, 1948. Book COB 49, page 526. [92]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT  
COURT OF APPEALS

Notice is hereby given that John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, petitioners herein, appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order of Judge Affirming Order of Referee in re Tax Claim and Overruling Objections to the Jurisdiction entered in this matter on March 26, 1948, in Civil Order Book 49, Page 526, and from the whole thereof.

Dated: April 7th, 1948.

HAROLD W. KENNEDY,  
County Counsel, and  
/s/ ANDREW O. PORTER,  
Deputy County Counsel,  
Attorneys for Petitioners.

[Endorsed]: Filed mailed copy to Francis B. Cobb, Atty. for Debtor, Apr. 7, 1948. [93]

[Title of District Court and Cause.]

SUPPLEMENTAL STATEMENT OF POINTS  
ON WHICH APPELLANTS INTEND TO  
RELY.

Appellants hereby adopt, with the same force and effect as if herein again set forth in full, as the statement of points on which they intend to rely the statement dated January 29, 1948, now on file herein.

Dated: April 7, 1948.

HAROLD W. KENNEDY,

County Counsel, and

/s/ ANDREW O. PORTER,

Deputy County Counsel.

Attorneys for John R. Quinn, County Assessor, and  
H. L. Byram, County Tax Collector of Los Angeles County, Appellants. [94]

Received copy of the within Supplemental Statement of Points on which Appellants Intend to Rely this 7th day of April, 1948.

FRANCIS B. COBB,

Attorney for Debtor-Appellee.

[Endorsed]: Filed April 7, 1948. [95]

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[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION  
OF RECORD

Appellants hereby adopt their designation of record filed on January 29, 1948, and in addition to

the matter designated therein hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Petition for arrangement under Chapter XI (omitting the schedules.)
2. Approval and Order of Reference to Benno M. Brink, Referee.
3. Affidavit for and Order Extending Time Within which to File Petition for Review dated September 17, 1947.
4. Order of Judge Affirming Order of Referee in re Tax Claim and Overruling Objections to the Jurisdiction dated March 26, 1948, entered in Civil Order Book 49, Page 526.
5. Notice of Appeal filed April 7, 1948.
6. Supplemental Statement of Points on which Appellants intend to rely filed April 7, 1948.
7. This Designation.

Dated: April 7th, 1948.

HAROLD W. KENNEDY,  
County Counsel, and  
/s/ ANDREW O. PORTER,  
Deputy County Counsel,  
Attorneys for Appellants.

Received copy of the within Supplemental Designation of Record this 7th day of April, 1948.

FRANCIS B. COBB,  
Attorney for Debtor-Appellee.

[Endorsed]: Filed April 7, 1948. [98]



[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 98, inclusive, contain full, true and correct copies of Petition Under Chapter XI (Section 322) of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference under Section 322 of the Bankruptcy Act; Referee's Certificate on Petition for Review of Order Upholding Jurisdiction re Tax Claims; Petition for Order to Show Cause in Connection with Tax Claim; Answer to Petition for Order to Show Cause in Connection with Tax Claim; Suggestion of Lack of Jurisdiction of Subject Matter (Rule 12(h) (2) Civil Procedure); Findings of Fact and Conclusions of Law of Referee re Tax Claim; Affidavit for and Order Extending Time Within Which to File Petition for Review; Petition for Review of Referee's Order by Judge; Minute Order Entered December 31, 1947; Opinion; Notice of Appeal filed Jan. 29, 1948; Undertaking for Costs on Appeal; Statement of Points on Which Appellants Intend to Rely; Designation of Record; Motion to Extend time for Filing Record and Docketing Appeal; Order Extending Time for Filing Record and Docketing Appeal; Order of Judge Affirming Order of Referee in re Tax Claim and Overruling Objections to the Jurisdiction; Notice of Appeal filed April 7, 1948; Supplemental Statement of Points

on Which Appellants Intend to Rely and Supplemental Designation of Record which constitute the transcript of record on the appeals of John R. Quinn, County Assessor, et al to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.15 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21st day of April, A.D., 1948.

[Seal] EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy Clerk.

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[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. John R. Quinn, County Assessor, and H. L. Byram, County Tax Collector of Los Angeles County, Appellants, vs. Aero Services, Inc., a corporation, debtor, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Filed April 23, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11907

JOHN R. QUINN, County Assessor and H. L.  
BYRAM, County Tax Collector of Los Angeles  
County,

Appellants.

vs.

AERO SERVICES, INC., a California corporation,  
Debtor-Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANTS INTEND TO RELY

Appellants adopt as their statement of points on which they intend to rely under Rule 19 (6) the statement of points filed in the District Court January 29, 1948.

Dated: April 26, 1948.

HAROLD W. KENNEDY,  
County Counsel, and  
/s/ ANDREW O. PORTER,  
Deputy County Counsel.

Attorneys for John R. Quinn, County Assessor and  
H. L. Byram, County Tax Collector of Los  
Angeles County, Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 27, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants hereby designate the parts of the record necessary for consideration under Rule 19(6) of the appeal as follows: Those portions of the record designated under date of January 29, 1948, in the District Court, together with those portions designated in the supplemental designation of record under date of April 7, 1948, in the District Court.

Dated: April 26, 1948.

HAROLD W. KENNEDY,

County Counsel, and

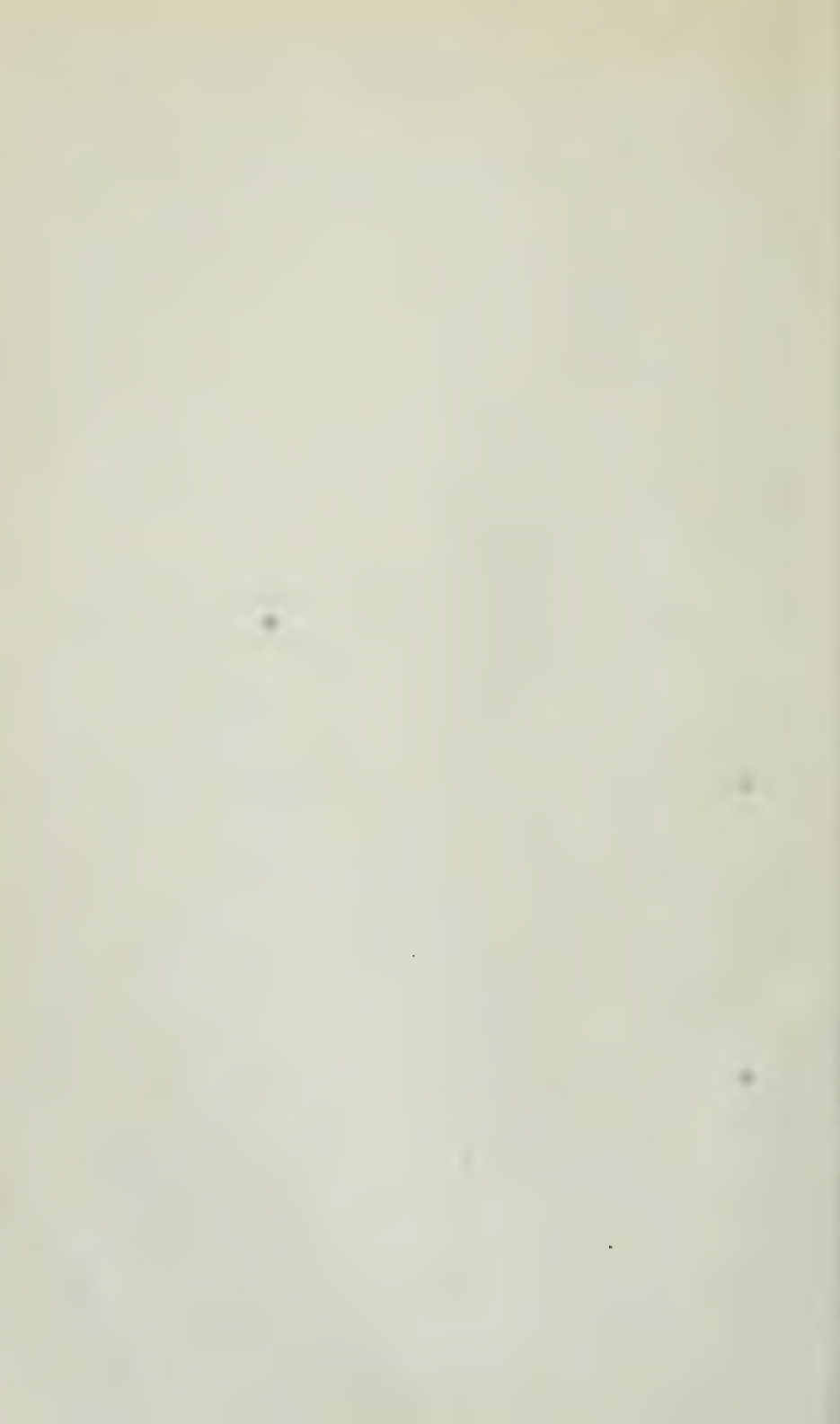
/s/ ANDREW O. PORTER,

Deputy County Counsel.

Attorneys for John R. Quinn, County Assessor and  
H. L. Byram, County Tax Collector of Los  
Angeles County, Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 27, 1948.





No. 11907

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

JOHN R. QUINN, County Assessor, and  
H. L. BYRAM, County Tax Collector,  
of Los Angeles County,

*Appellants,*

vs.

AERO SERVICES, INC., a corporation,  
debtor,

*Appellee.*

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APPELLANTS' BRIEF

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HAROLD W. KENNEDY,  
County Counsel,

ANDREW O. PORTER,  
Deputy County Counsel,  
and

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Deputy County Counsel,  
*Attorneys for Appellants.*

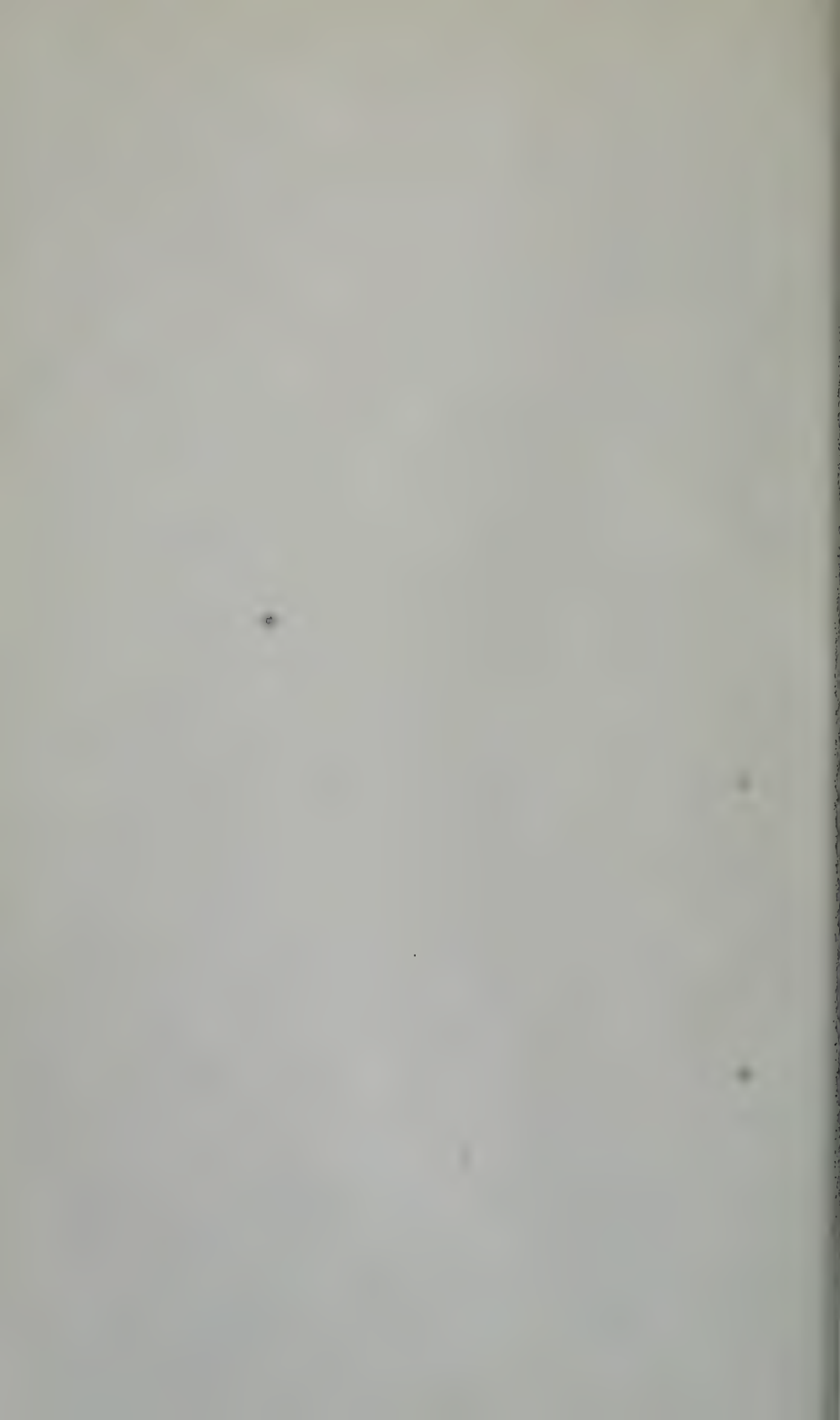
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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

JOHN R. QUINN, County Assessor, and  
H. L. BYRAM, County Tax Collector,  
of Los Angeles County,

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AERO SERVICES, INC., a corporation,  
debtor,

*Appellee.*

---

No. 11907

**APPELLANTS' BRIEF**

---

**Basis for Jurisdiction**

**I.**

**Statement of Proceedings.**

On June 3, 1946, the Appellee, Aero Services, Inc. (hereafter called "Debtor"), filed a petition with the District Court of the United States for the Southern District of California, Central Division (hereafter called "Bankruptcy Court"), for an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act (52 Stat. 905; 11 U. S. C. A., Sec. 701-799)



(T. R. 2-13). Thereafter, by appropriate orders, the Bankruptcy Court referred the petition to the Honorable Benno M. Brink, Referee in Bankruptcy, and permitted the Debtor to remain in possession of its assets (T. R., 13-14, 16).

On December 6, 1946, the Debtor filed a petition for an order directing John R. Quinn and H. L. Byram, respectively the Los Angeles County Assessor and Tax Collector (hereafter called "County Tax Officers"), to appear and show cause why the Referee should not determine the amount of the taxes due by it to Los Angeles County and should not direct the manner and time of the payment of such taxes (T. R., 20-22, 40). The requested order being issued, (T. R., 17), the County Tax Officers answered (T. R., 23-30) and objected to the Bankruptcy Court's jurisdiction (T. R., 31-35). After a hearing the Referee overruled the objections to jurisdiction and, following appropriate proceedings (T. R., 17), on direction of the Bankruptcy Court, entered on September 8, 1947, a written order affirming the jurisdiction of that court (T. R., 42-45). Thereafter the County Tax Officers filed a petition for review of the Referee's order by the Bankruptcy Court (T. R., 47-60). On December 31, 1947, the Bankruptcy Court (the Honorable J. F. T. O'Connor, District Judge) ordered that the County Tax Officers' objections to the jurisdiction of the Bankruptcy Court be overruled (75 F. Supp. 347) (T. R., 61-79). On January 29, 1948, the County Tax Officers filed a notice of appeal (T. R., 80). The Bank-

ruptcy Judge thereafter signed a formal order affirming the order of the Referee and overruling the objections to the Bankruptcy Court's jurisdiction (T. R., 91-92). This order was entered and docketed on March 26, 1948 (T. R., 92). The County Tax Officers filed a new notice of appeal on April 7, 1948 (T. R., 93). The appeals are submitted on a single record and will be hereafter referred to as if they constituted a single appeal.

## II.

### **Jurisdiction of the Bankruptcy Court.**

The Bankruptcy Court obtained jurisdiction of the Debtor and his property under Section 311 of the Bankruptcy Act (52 Stat. 906, 11 U. S. C. A. Sec. 711). It referred the matter to a Referee under Section 331 of the Bankruptcy Act (52 Stat. 908, 11 U. S. C. A., Sec. 731) and continued the Debtor in possession under Section 342 (52 Stat. 909, 11 U. S. C. A., Sec. 742) of the Bankruptcy Act. The Referee heard the Debtor's petition to show cause by virtue of Section 64a (4) of the Bankruptcy Act (60 Stat. 330, 11 U. S. C. A., Sec. 104(a) (4)).

The jurisdiction of the Bankruptcy Court to review the Referee's order is found in Section 39c of the Bankruptcy Act (52 Stat. 858, 11 U. S. C. A., Sec. 67c) and Rule 204, Bankruptcy Rules of the District Court of the United States for the Southern District of California.

### III.

#### **Jurisdiction of the Circuit Court of Appeals.**

The two notices of appeal were filed under Rule 73a of the Rules of Civil Procedure. The jurisdiction of the Circuit Court of Appeals to hear this appeal is granted by Sections 24a and b and Section 316 of the Bankruptcy Act (52 Stat. 854, 11 U. S. C. A., Sec. 47a and b; 52 Stat. 907, 11 U. S. C. A., Sec. 716). The order from which this appeal is taken is appealable. (*Arkansas Corporation Com. v. Thompson*, (1940) (C. C. A. 8), 116 F. 2d 179, 181, (affirming *In re Missouri Pacific Ry Co.*, (1940) (E. D. Mo.) 33 F. Supp. 728); *certiorari* granted and case reversed on the merits, (1941) 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.)

## Statement of the Case

This is an appeal by the County Tax Officers from the order of the Bankruptcy Court affirming its jurisdiction under Section 64a(4) of the Bankruptcy Act (60 Stat. 330, 11 U. S. C. A. Sec. 104(a)(4) to redetermine the assessed valuation of the Debtor's personalty for county property tax purposes.

The first Monday in March is the tax and lien date in California. (Calif. Rev. & Tax. Code Secs. 405, 2192, 117.) On said day the Debtor was the owner of the personalty in question and of certain real property situated in Los Angeles County, on which the personal property tax to be thereafter determined then became a lien (T. R., 39, Calif. Rev. & Tax. Code Sec. 2189). On May 14, 1946, a verified declaration of the property for county tax purposes, made on behalf of the Debtor by its auditor, was filed with the County Assessor (T. R., 39). This declaration showed the taxable value of the aforesaid personalty of the Debtor on the aforementioned first Monday in March, 1946, to have been \$355,710 (T. R., 39). Thereafter, on or at some time prior to the first Monday of July, 1946, the County Assessor fixed the value of this personalty for county tax purposes at the figure named in the declaration (T. R., 16, Calif. Rev. & Tax. Code, Sec. 616).

On June 3, 1946, the Debtor initiated bankruptcy proceedings by filing its petition under Section 322 of Chapter XI of the Bankruptcy Act (T. R., 2-13). On July 1, 1946, the County Board of Equalization



commenced its review of all assessments within the county for the purpose of correcting any errors of the County Assessor and for the further purpose of equalizing the assessments (T. R., 40, Calif. Rev. & Tax. Code, Secs. 1603, 1605). The Debtor failed to file an application for or to appear at the public hearings before this Board to secure a reduction in its personalty assessment (T. R., 40). Accordingly, said assessment at the aforesaid figure became final on or about July 15, 1946. (Calif. Rev. & Tax Code, Sec. 1614.)\* Thereafter, a tax bill, based upon the aforesaid assessment, was submitted to the Debtor (T. R., 40).

On November 1, 1946, the county tax upon this personalty became due and on December 5, 1946, it became delinquent (T. R., 40; Calif. Rev. & Tax. Code, Secs. 2605, 2617). The following day, December 6, 1946, the Debtor filed a petition with the Bankruptcy Court for an order directing the County Tax Officers to appear and show cause why the Bankruptcy Court should not redetermine the assessed valuation of the Debtor's personalty for county tax purposes (T. R., 20-22). The order being issued (T. R., 17), the County Tax Officers answered and objected to the jurisdiction of the Bankruptcy Court to make such a redetermination (T. R., 23-35). After a hearing the Referee overruled the objections of the County Tax Officers (T. R., 42-45), and upon review the Bankruptcy Court af-

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\*Even if it is conceded for the purpose of argument only that the time to appear before the County Board of Equalization was extended by Section 11e of the Bankruptcy Act (11 U. S. C. A., Sec. 29a), it was extended only sixty days subsequent to the date of adjudication, or until August 2, 1946. (Sec. 312(2), Bankruptcy Act; 11 U. S. C. A., Sec. 712(2).)

firmed the order of its Referee (T. R., 61-79 and 91-92). The County Tax Officers thereupon took this appeal (T. R., 80, 93).

Upon this appeal there is no issue of fact between the parties (T. R., 19). The sole question of law is the jurisdiction of the Bankruptcy Court to redetermine the assessed valuation of the Debtor's personalty for county tax purposes under the circumstances above set forth. So far as here material, Section 64a(4) reads as follows:

“Sec. 64. DEBTS WHICH HAVE PRIORITY. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; . . . *And provided further, That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . .*” (Italics theirs.)

The Bankruptcy Court and its Referee both took the position that the bankruptcy proceedings having been initiated prior to the time at which the challenged assessment became final, the limitation placed upon the Bankruptcy Court's jurisdiction, under the language of Section 64a (4) quoted above, by *Arkansas Corporation Com. v. Thompson*, (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244, is without application and therefore the Bankruptcy Court may, under the grant

of power made by the proviso quoted above, redetermine the assessment.

Our position, on the other hand, is that (as will be explained in our Summary of the Argument and as will be developed fully in the argument itself) the limitation upon the Bankruptcy Court's jurisdiction imposed by the Arkansas decision does apply and consequently the Bankruptcy Court in this case was without power to make the order from which this appeal is taken.

### Specification of Errors

1. The Bankruptcy Court erred in ignoring the fact that a final quasi judicial determination of the challenged assessment had been made under California law long prior to the time of the application to it for redetermination of that assessment.

2. The Bankruptcy Court erred in failing to give effect to the finality of the quasi judicially determined assessment at issue.

3. The Bankruptcy Court erred in not recognizing that it lacked the power to disturb the challenged assessment under the rule of *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.

## Summary of the Argument

It is submitted that the conclusion of the Bankruptcy Court and of its Referee that the court had jurisdiction under Section 64a(4) of the Bankruptcy Act to redetermine the challenged assessment, because bankruptcy proceedings were initiated about six weeks prior to the time when the challenged assessment became final, is incorrect and a perversion of the function of Bankruptcy Courts under the doctrine of *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. Stated otherwise the common error of the Bankruptcy Court and its Referee lies in their assumption that the limitation upon the court's jurisdiction imposed by the Arkansas decision does not apply where bankruptcy proceedings are initiated before the assessment at issue is finally quasi judicially determined. A careful reading of the Arkansas decision would have prevented this error. The facts recited in the Supreme Court's opinion at page 140 reveal that in this controlling case bankruptcy preceded the finality of the challenged assessment by some six years. Moreover, the identical question had been decided adversely to our Bankruptcy Court's position in *Baumann v. Sheehan* (1944) (C. C. A. 8), 140 F. 2d 747, 751.

Obviously, the Arkansas and the Baumann cases embody the correct rule since the existence of a power must always be determined as of the time of its exercise. Here the assessment under attack had been



finally quasi judicially determined almost five months prior to the application to the Bankruptcy Court for redetermination. Redetermination under such circumstances would manifestly make the Bankruptcy Court a “super-assessment tribunal”—a status forbidden to it by the Arkansas decision.

The argument that follows demonstrates that the assessment at issue was quasi judicially determined, that it became final almost five months prior to the application to the Bankruptcy Court for redetermination, and that consequently the Bankruptcy Court, under the rule of the Arkansas decision, lacked at that time the power to act thereon.

Accordingly, it is respectfully submitted that the order appealed from should be reversed.

## Argument

### I.

#### **The California Procedure for Assessment of Property Taxes Provides a Valid Quasi Judicial Determination Thereof.**

##### *A. The Procedure.\**

The assessment procedure in California functions from March to July and in some cases into August. Between the first Mondays in March and July the County Assessor is required to ascertain and assess all taxable property within his jurisdiction as of the first Monday in March. (Sec. 405.) Between the first Monday in March and the last Monday in May each taxpayer is required to file with the County Assessor a verified declaration of his taxable property. (Sec. 441.) In addition, the County Assessor is authorized to subpoena and examine any taxpayer with respect to any statement disclosing taxable property. (Sec. 454.) Upon completion of the assessment roll on or before the first Monday in July, he delivers it to the County Board of Equalization. (Secs. 616, 617).

The County Board of Equalization, immediately upon receipt of the roll, gives notice by publication of its completion and the time at which the Board will meet to equalize assessments. (Sec. 1601.) Taxpayers desiring reductions in their assessments must,

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\*All statutory citations in this subdivision are to the California Revenue and Taxation Code.

either in person or by an agent, then file verified written applications for such reductions setting forth the supporting facts and the applicants must be examined under oath by the Board concerning the value of their property. (Secs. 1607, 1608.) The Board may, in the course of its hearing of any application, subpoena witnesses and take evidence and the Assessor and his deputies must be present to present evidence as needed. (Secs. 1609, 1610.) The session of the Board commences on the first Monday in July and continues not later than the third Monday in July. (Sec. 1603).<sup>\*</sup> For the purpose of equalizing assessments the Board may increase or decrease individual assessments. (Sec. 1605.) Following the close of the Board's session the corrected assessment roll is delivered to the County Auditor for totaling of the valuations thereon. (Secs. 1614, 1646.)

B. *Its legal effect.*

From the foregoing recital of the California assessment procedure it is apparent that the Assessor may act judicially within the meaning of the Arkansas decision (*Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 143-144, 61 S. Ct. 888, 85 L. Ed. 1244), in that he may hold hearings in arriving at his assessed valuations. However, he is not compelled to do so and there is nothing in the record to indicate that he did so in the present case, in view of the fact

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<sup>\*</sup>The County Board of Equalization may secure an extension of its session for not more than 20 days (or 40 days in the event of a public calamity) but said extension does not extend the deadline for filing applications for reduction of assessments. (Sec. 155.)

that such a hearing was apparently made unnecessary by reason of his acceptance of the Debtor's declared valuation. Consequently we do not argue that the County Assessor here acted judicially within the meaning of the Arkansas rule, although he obviously did so within the broad meaning of the term "judicial." (*Siebe v. Superior Court* (1896), 114 Cal. 551, 552, 46 Pac. 456; 3 Cooley, Taxation (4th Ed. 1924), Sec. 1143, p. 2296.)

On the other hand, the California assessment procedure requires the County Board of Equalization to give notice of its session and to hold hearings upon every verified written application for reduction in assessment duly presented to it. These hearings must include examination of the applicants under oath concerning the value of their property, and the Board may subpoena witnesses and take evidence as necessary, including that of the Assessor and his staff, who must be present as needed. Clearly this procedure for the review of the correctness of the assessments made by the County Assessor and for their equalization constitutes a valid and constitutional quasi judicial determination. (*Hagar v. Reclamation Dist. No. 108* (1884), 111 U. S. 701, 710, 4 S. Ct. 663, 28 L. Ed. 569.) The California cases so hold without exception.

In the early case of *People v. Goldtree* (1872), 44 Cal. 323, the California Supreme Court said at pages 325-326:

" . . . The Board of Equalization, in passing on the question whether an assessment is too

high or too low, *acts in a judicial capacity*, and its decision is an adjudication, and as clearly so as a judgment for the recovery of a tax. . . .” (Italics ours.)

In *Oakland v. Southern Pacific Co.* (1900), 131 Cal. 226, 230, 63 Pac. 371, the settled rule in California was declared to be that the Board could act *only upon evidence* in raising or lowering an assessment.

In *Los Angeles Etc. Co. v. County of L. A.* (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277, the court spoke as follows at page 169 with respect to the function of the County Board of Equalization:

“ . . . Upon such hearing it is the duty of such board to determine the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable. In discharging these duties *the board is exercising judicial functions*, and its decision as to the value of the property and the fairness of the assessment *so far as amount is concerned* constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question which abrogates and takes the place of the judgment of the assessor upon that question. . . .” (Italics ours.)



## II.

### **The Challenged Assessment Became Final and Conclusive Upon Termination of the County Board of Equalization's Proceedings.**

The latest case in California enunciating this thoroughly established principle is *Universal Cons. Oil Co. v. Byram* (1944), 25 Cal. 2d 353, 153 P. (2d) 746. There the court stated at page 362:

“ . . . As appears from the numerous authorities cited in the forepart of this opinion, the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal. Const., art. XIII, Sec. 9), and when that tribunal, after due hearing and within the limits of reasonable discretion, makes its *findings on the facts*, such decision is final and conclusive. . . . ” (Italics theirs.)

Like statements of this basic principle may also be found in:

*Eastern Columbia, Inc. v. County of Los Angeles* (1943), 61 Cal. App. 2d 734, 744-745, 70 P. (2d) 507;

*Hammond L. Co. v. County of Los Angeles* (1930), 104 Cal. App. 235, 241, 285 Pac. 896;

*Globe G. & M. Co. v. Los Angeles Co.* (1923), 62 Cal. App. 297, 299, 216 Pac. 631;

*San Jose Gas Co. v. January* (1881), 57 Cal. 614, 616.

To quote again from *Los Angeles Etc. Co. v. County of L. A.*, *supra*, 162 Cal. 164 at page 168 (121 Pac. 384):

“ . . . The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors acting as a county board of equalization, the conclusion of those tribunals on such a question of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and it has been so held in this state. (Citing authority.) . . . ”

A. *This finality is not affected by the failure of the taxpayer to avail himself of his right to review by the County Board of Equalization.*

This obvious corollary to the basic rule of finality has long been established in California. (*Luce v. City of San Diego* (1926), 198 Cal. 405, 245 Pac. 196; *Dawson v. County of Los Angeles* (1940), 15 Cal. 2d 77, 81, 98 P. (2d) 495). It is likewise followed elsewhere (3 *Cooley op cit.* Sec. 1201, p. 2406), and is but an application of the more general and well settled rule that a judgment by default is a proper basis for a plea of res judicata and estoppel. (*Guardianship of Jacobson* (1947), 30 Cal. 2d. 326, 334, 182 P. (2d) 545; *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d. 127, 131-132, 177 P. (2d) 364; Rest., Judgments, Sec. 68, p. 294, 302; Note, 128 A. L. R. 472, 474.)

### III.

#### **The Bankruptcy Court is Without Power to Redetermine The Challenged Assessment Following the Quasi Judicial Determination Thereof Pursuant to Califor- nia Law.**

This is the rule of *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. There the Missouri Pacific Railroad went into reorganization under Section 77 of the Bankruptcy Act in 1933. The Trustee in Bankruptcy, who was operating the railroad, participated in an assessment hearing before the Arkansas Corporation Commission concerning the 1939 taxes to be levied upon the railroad. Instead of appealing from the assessment order of the Commission to the state courts the Trustee allowed his time for appeal to lapse and then thereafter petitioned the Bankruptcy Court to determine the assessment (pp. 140-141). Under Section 64a(4) of the Bankruptcy Act the Bankruptcy Court held that it had the power to make the requested determination and the Circuit Court of Appeals affirmed this holding. The Supreme Court, however, reversed. After quoting the applicable language of Section 64a(4), quoted herein, *supra*, the court said at pages 142-143:

“ . . . Nothing in this language indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact—the

value of the property taxed. Manifestly, whether or not taxes are 'legally due and owing' to a state depends upon the valid laws of that state. *Ad valorem* taxes depend upon a determination of value. The governmental function of fixing the value for tax purposes has rarely, if ever, been a judicial function. . . ."

Toward the end of its opinion the court further said at page 145:

" . . . Bankruptcy and reorganization proceedings today cover a wide area in the business field. But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as *super-assessment tribunals* over state taxing agencies. . . ." (Italics ours.)

The rule of the Arkansas case that the Bankruptcy Court is without power to disturb a final quasi judicially determined assessment has been reiterated rather recently in *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504. The court spoke as follows at page 578:

"*Third.* We held in *Arkansas Corp. Commission v. Thompson*, 313 U. S. 132, 85 L. Ed. 1244, 61 S. Ct. 888, 45 Am. Bankr. Rep. (N. S.) 462, *supra*, that the reorganization court lacked the power under Sec. 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings *which afforded ample protection to the railroad's rights*. We adhere to that decision. Its ruling



precludes redetermination by the reorganization court in this case of the valuations underlying the assessments made by the state authorities and the validity of those assessments used as the basis for the computation of the taxes. (Latter italics ours.)

There is but one fundamental factual distinction between the Arkansas case and the instant case. In the Arkansas case the Trustee in Bankruptcy participated in the assessment hearing before the state administrative agency; here the Debtor ignored the opportunity for a hearing on his assessment before the County Board of Equalization. This factual distinction is, however, without legal consequence so far as the basis for the rule of the Arkansas case is concerned. Our Bankruptcy Court itself conceded this in the following language (T. R., 74):

“The minimum requirement apparently would be a determination by a quasi-judicial body in conjunction with quasi-judicial hearing, *or at least the right to such hearing.*” (Italics ours.)

In so stating it was following two Circuit Court decisions which held that the failure of the bankrupt to avail himself of the quasi judicial review of the challenged assessments afforded him by the state, could not invest the Bankruptcy Court with power under Section 64a(4) to revise the assessment. (*Commonwealth of Pennsylvania v. Aylward* (1946), (C. C. A. 8), 154 F. 2d. 714, 717; *In re Ingersoll Co.* (1945), (C. C. A. 10), 148 F. 2d. 282, 284.) As argued under Point



II (A) *supra*, these two federal decisions were in accord with the comparable California law and merely applied a fundamental rule of res judicata and estoppel. (See *Gardner v. New Jersey*, *supra* (1947), 329 U. S. 565, 584; *Lyford v. City of New York* (1943), (C. C. A. 2), 137 F. 2d 782, 786.)

This brings us at last to the strange basis for the Bankruptcy Court's decision in this case. The court held that the circumstance that the bankruptcy proceedings were initiated prior to opportunity for quasi judicial determination of the challenged assessment precluded the application of the Arkansas rule (T. R., 79). The facts of the Arkansas case itself, as recited above, belie this conclusion. The railroad had been in bankruptcy for some six years before the assessment challenged in the Bankruptcy Court was made. Furthermore, this identical question had been decided adversely to the position taken by our Bankruptcy Court in *Baumann v. Sheehan* (1944), (C. C. A. 8), 140 F. 2d. 747, 751, where the contested assessments were largely made while the property was in the possession and under control of the liquidating trustee.

IV.

**Conclusion**

It is respectfully submitted that the Arkansas and Baumann decisions embody the correct interpretation of the Bankruptcy Court's power under Section 64a(4) in view of the elementary proposition that the question of the existence of a power must be determined as of the time the power is sought to be exercised. Since the assessment at issue had been finally determined by a quasi judicial body some five months prior to the application to the Bankruptcy Court for redetermination, the Bankruptcy Court at the time of the application for redetermination was without power to act thereon.

Accordingly, the order appealed from should be reversed.

Respectfully submitted,

HAROLD W. KENNEDY,

County Counsel,

ANDREW O. PORTER,

Deputy County Counsel,

and

JAMES A. COBEY,

Deputy County Counsel,

*Attorneys for Appellants.*



No. 11907

IN THE

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FOR THE NINTH CIRCUIT

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*Appellants,*

*vs.*

AERO SERVICES, INC., a corporation, debtor,

*Appellee.*

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APPELLEE'S BRIEF.

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No. 11907

IN THE

**United States Circuit Court of Appeals**  
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*vs.*

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---

**APPELLEE'S BRIEF.**

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Appellee has no objection to the statement of the case as set forth in Appellants' Opening Brief.

**ARGUMENT.**

**Appellee's Reply to Appellants' Point I.**

Appellants' argument under this point may be summarized as an effort to cloak the County Assessor with the raiment of a judicial officer and the County Board of Equalization with the title "Judicial tribunal" and after assuming these premises to be proven to rely on a plea of *res adjudicata* by a *quasi* judicial tribunal after exclusive jurisdiction of the bankruptcy court had attached, and then point to *Arkansas v. Thompson* as decisive of the question.

Appellee submits that the defense of *res adjudicata* is a personal defense that the party asserting it is required to submit the plea as a defense, and if the defense is entertained by the judicial tribunal to whom the plea is made it then operates as a bar to the action. The doctrine being a defense does not deprive the tribunal of jurisdiction but on the hearing if the trial tribunal finds all of the essential elements to exist the defense then defeats the petitioner's cause, on the other hand if any of the essential elements are lacking the defense fails. The trial tribunal to which the plea is made determines the issues as in any other case.

The jurisdiction of the referee in bankruptcy is not acquired or lost by the plea of *res adjudicata* as a legal defense, but like all personal defenses, the trial tribunal determines the plea on the facts and law and renders a decision on the merits.

Jurisdiction of the bankruptcy court exercised through the Referee in Bankruptcy is conferred by the Bankruptcy Act Section 64(a) Sub. 4, 60 Statutes 330, 11 U. S. C. A. Section 104a(4) which provides,

“\* \* \* taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *and provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court;”

*Taylor v. Sternberg*, 293 U. S. 470, 55 S. Ct. 260 where the rule is stated as follows:

“Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and exclusive; and thereafter that court’s possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual.”

The plea of *res adjudicata* or as termed by appellants a “Valid *Quasi* Judicial Determination,” has been set up in Appellants’ Answer [Tr. 23, 24].

The Referee in Bankruptcy has not determined the facts in respect to this defense but the interlocutory order that determined he had jurisdiction, so to do, was reviewed and thereafter appealed to this court.

Appellee submits that the defense of a final “Valid *Quasi* Judicial Determination” cannot be urged as a defense as a matter of law until the Referee in Bankruptcy determines by proper findings and order the following essential elements of *res adjudicata*, to-wit:

(a) Is the County Assessor or the County Board of Equalization a judicial tribunal.

(b) Was there a hearing or waiver of hearing had as required under the doctrine of Due Process.

(c) Did the right to determine the question pass to the Bankruptcy Court on the filing of the petition.

(d) Did the Bankruptcy Court have exclusive jurisdiction to determine the question on the filing of the original petition.



(e) Has there been a final determination by a judicial tribunal that the Bankruptcy Court is required to give full faith and credit.

Since counsel for Appellants admit under Argument Point I, pages 14 and 15 of Sub. B of Appellants' Brief:

“From the foregoing recital of the California assessment procedure it is apparent that the Assessor may act judicially within the meaning of the Arkansas decision (*Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 143-144, 61 S. Ct. 888, 85 L. Ed. 1244), in that he may hold hearings in arriving at his assessed valuations. However, he is not compelled to do so and *there is nothing in the record to indicate that he did so in the present case, in view of the fact that such a hearing was apparently made unnecessary by reason of his acceptance of the Debtor's declared valuation. Consequently we do not argue that the County Assessor here acted judicially within the meaning of the Arkansas rule, although he obviously did so within the broad meaning of the term 'judicial.'* (*Siebe v. Superior Court* (1896), 114 Cal. 551, 552, 46 Pac. 456; 3 Cooley, Taxation (4th Ed. 1924), Sec. 1143, p. 2296.)”

there is nothing in the record before the court to indicate a judicial determination by the Assessor or County Board of Equalization, then the question as to the powers and jurisdiction of the *quasi* judicial tribunal becomes moot.

### Reply to Appellants' Point II.

Since counsel admits the record is bare of any determination by the alleged “*Quasi Judicial Tribunal*,” the argument on the finality and jurisdiction of the County Board of Equalization is irrelevant. Counsel for Appellants might have discussed the jurisdiction of the Superior

Court and the finality of its judgments, but until a judgment of that court was offered in evidence and the essential elements to establish *res adjudicata* were proven, the point of jurisdiction and finality are immaterial.

### Reply to Appellants' Point III.

In arguing this point Appellant has assumed the unproven premise that there has been a final judicial determination by a tribunal of competent jurisdiction and that the Bankruptcy Court is required to give full faith and credit to the determination under the Appellants' plea of *res adjudicata*.

Appellants rely on two Supreme Court cases, *Arkansas v. Thompson*, and *Gardner v. N. J.* We feel those cases have no bearing on the question here for the reason that both decisions were based on evidence showing all the element of a defense of *res adjudicata*. In the *Arkansas* case the Railroad Commission was held to be a *Quasi* Judicial tribunal, the debtor invoked its jurisdiction, a trial was had and a final order was entered, the trustee submitted to jurisdiction and after having had his day in court tried to retry the matter before the Bankruptcy Court and ask that court not to give full faith and credit to a final order of a tribunal that had jurisdiction.

In *Gardner v. N. J.* we have the Supreme Court pointing out that the jurisdiction of the Bankruptcy Court is exclusive but it should be exercised in accordance with law, and on similar facts as the law is stated in *Arkansas v. Thompson*.

### Appellee's Position.

Appellee submits that the well prepared and able decision of Judge O'Connor [Tr. 62 to 79], clearly defines the issues and distinguishes the cases upon this question. The Bankruptcy Court has the duty and power to determine the amount and validity of tax claims. See *State of New Jersey v. Anderson*, 203 U. S. 483, 17 A. B. R. 63, 27 S. Ct. 137.

*Gardner v. New Jersey*, 328 U. S. 850, 329 U. S. 565, 91 L. Ed. Adv. P. 410 (1-20-47) ;

*Lyford v. State of New York*, 137 F. (2d) 782;

*Monongahela Rye Liquors, Inc.*, 141 Fed. (2d) 864.

In determining the question, the Bankruptcy Court determines the defense of *res adjudicata* on the evidence and law applicable to such a defense, and if any of the elements are lacking can deny the same.

This appeal is an effort to avoid a trial on the merits before a court of competent jurisdiction, and the urged technical ground is based on a plea of *res adjudicata* which counsel admits the tribunal, to-wit: the Assessor, did not act judicially and there is no evidence to support a finding on the plea of *res adjudicata*.

Appellee submits the Order appealed from should be affirmed and that the law is correctly stated in the decision of the lower court.

Respectfully submitted,

FRANCIS B. COBB,

*Attorney for Appellee.*

No. 11907

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

JOHN R. QUINN, County Assessor and  
H. L. BYRAM, County Tax Collector,  
of Los Angeles County,

*Appellants,*

vs.

AERO SERVICES, INC., a corporation,  
Debtor.

*Appellee.*

APPELLANTS' REPLY BRIEF

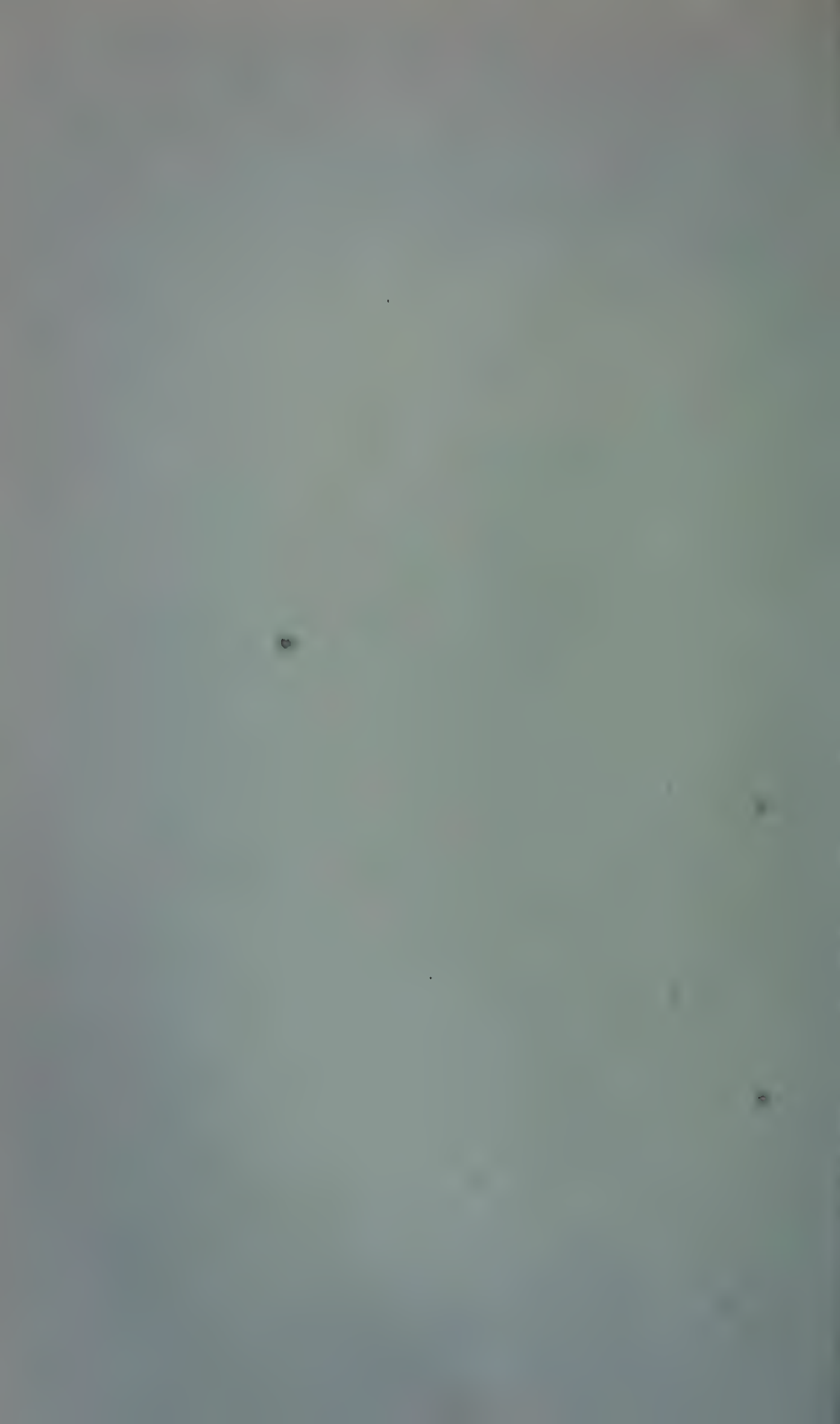
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HAROLD W. KENNEDY, County Counsel,  
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*Attorneys for Appellants.*

FILED

AUG 7 1948

PAUL R. O'BRIEN





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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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JOHN R. QUINN, County Assessor and  
H. L. BYRAM, County Tax Collector,  
of Los Angeles County,

*Appellants,*

vs.

AERO SERVICES, INC., a corporation,  
Debtor.

*Appellee.*

---

No. 11907

**APPELLANTS' REPLY BRIEF**

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**Introduction: Summary of Reply Argument**

The County Tax Officers' reply to the brief of the Debtor (Appellee) may be briefly stated. First, the Debtor is laboring under a fundamental misconception of the nature and the scope of the limitation on the power of the Bankruptcy Court under Section 64a(4) over tax claims imposed by *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. This limitation is not simply one of *res judicata*; it is rather a restriction upon the *power* of the Bankruptcy Court to act under Section 64a(4). Secondly, the Debtor fails to recognize that an opportunity for a final quasi judicial determination

is the equivalent in legal effect to such a determination. Thirdly, the cases relied upon by the Debtor to support his position are plainly inapplicable to the situation here presented. Fourthly, this Honorable Court has already indicated in *Kelly v. United States* (1937), (C. C. A. 9), 90 F. 2d 73, the correctness of our position.

## Argument

### I.

#### **The Rule of the Arkansas Case Is a Limitation Upon the Power of the Bankruptcy Court Over Tax Claims.**

The Debtor would have this Court believe that the rule of *Arkansas Corporation Com. v. Thompson, supra*, 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244, is simply one of res judicata. The plain language of the opinion in that case dispels such a narrow interpretation. Mr. Justice Black spoke as follows at pages 138, 139:

“This case raises questions concerning the right and *power* of a federal bankruptcy court to revise and redetermine for state tax purposes the property value of a railroad (Missouri Pacific) in reorganization under Section 77 of the Bankruptcy Act, 11 U. S. C. A. Section 205, the state (Arkansas) having already determined such value through its own taxing officials and in accordance with

the procedure prescribed by valid state legislation. . . .

“ . . . For we are of opinion that the congressional language giving to the bankruptcy court *power* to determine the ‘amount or legality’ of taxes does not mean that the court is given *power* to redetermine and revise the property value finally fixed by a state under the circumstances revealed by the trustee’s petition, even though that value is the basis used in computing the amount of taxes ‘legally due and owing.’ ” (Italics ours.)

Clearly the Supreme Court was talking in terms of the power of the Bankruptcy Court and the extent thereof rather than simply of *res judicata*. This interpretation is confirmed by the words of the Supreme Court in the later case of *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504, which we quoted in our initial brief at pages 20 to 21 thereof. There the Court, speaking through Mr. Justice Douglas, said at page 578:

“*Third.* We held in *Arkansas Corp. Commission v. Thompson*, 313 U. S. 132, 85 L. Ed. 1244, 61 S. Ct. 888, 45 Am. Bankr. Rep. (N. S.) 462, *supra*, that the reorganization court *lacked the power* under Sec. 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad’s rights. We adhere to that decision. . . . ” (Last italics ours.)



## II.

**There Was a Valid and Final Quasi Judicial  
Determination of the Challenged Assessment**

At page 4 of the Debtor's (Appellee) brief, immediately following its quotation from our initial brief, the Debtor argues that "there is nothing in the record before the court to indicate a judicial determination by the Assessor or County Board of Equalization. . . . " This argument is without foundation in that it ignores what the Bankruptcy Court itself conceded in its opinion, (T. R. 74, lines 9, 10) *that the opportunity for a quasi judicial hearing is the equivalent in law of such a hearing*. The record shows that the Debtor failed to avail itself of its right to such a hearing before the County Board of Equalization (T. R. 40). Our initial brief conclusively demonstrates that the procedure of the County Board of Equalization constituted an opportunity for a final quasi judicial determination within the meaning of the Arkansas rule. The Debtor, having failed to avail itself of such an opportunity, is now clearly estopped to claim that its own laches should afford it the right to a redetermination by the Bankruptcy Court. (*Commonwealth of Pennsylvania v. Aylward* (1946), (C. C. A. 8), 154 F. 2d 714, 717; *In re Ingersoll Co.* (1945), (C. C. A. 10), 148 F. 2d 282, 284.)

## III.

**Appellee's Cases Are Inapplicable**

The cases relied upon by the Debtor (Appellee) are without application to the situation here presented. *Taylor v. Sternberg* (1935), 293 U. S. 470, 55 S. Ct. 260, 79 L. Ed. 599, is concerned with the Bankruptcy Court's exclusive jurisdiction over the property of the bankrupt and has nothing to do with the question involved here—the power of the Bankruptcy Court under Section 64a(4) over tax claims. *New Jersey v. Anderson* (1906), 203 U. S. 483, 27 S. Ct. 137, 51 L. Ed. 284, and *In re Monongahela Rye Liquors* (1944), (C. C. A. 3), 141 F. 2d 864, state the sound rule that where there has been no quasi judicial determination of the assessment, the Bankruptcy Court has the power under Section 64a(4) to redetermine the assessment. Obviously this rule has no application to the instant case where a valid quasi judicial determination was made.

In *Lyford v. City of New York* (1943), (C. C. A. 2), 137 F. 2d 782, the quasi judicial determination of the local taxing agency had not been completed in almost five years and therefore it was deemed proper for the Bankruptcy Court to redetermine the challenged assessment under those circumstances. However, in the present case there has been no laches on the part of the County Tax Officers; the Lyford case is consequently inapplicable.

## IV.

**The Kelly Case Establishes the Correctness of Our Position**

This Honorable Court decided the case of *Kelly v. United States, supra*, 90 F. 2d 73, over ten years ago and its conclusion in that case demonstrates the soundness of our position in this case. A comparison of the chronology of the essential operative events in the two cases establishes this.

The relevant chronology of the Kelly case is as follows. On January 4, 1934, the Board of Tax Appeals rendered its decision sustaining certain federal income tax determinations of the Collector of Internal Revenue (p. 74). On January 12, 1934, the Commissioner made an assessment based upon these determinations (p. 74). On February 9, 1934, the taxpayer was adjudicated a bankrupt (p. 75). On April 4, 1934, the B. T. A.'s decision became final (p. 76). On June 1, 1934, the United States presented to the Bankruptcy Court its claim for taxes and interest based on the aforementioned assessment of January 12th (p. 75). On June 18, 1934, the Trustee filed his objections to the claim (p. 75). These objections were the same as those presented to the B. T. A. (p. 75). However, the Referee held a hearing on them and thereafter disallowed the claim of the United States (p. 75). On review the Bankruptcy Court reversed its Referee and the case was then appealed to this Court (p. 75). This Court, speaking through Judge Mathews, said at page 76:

“ . . . The question here presented is whether the Board’s decision was conclusive on the bankruptcy court. We think it was. . . .

“Appellant relies also on section 64a of the Bankruptcy Act, . . .

“There is no merit in appellant’s contention that, under this section, the bankruptcy court could and should have determined the question which he attempted to raise by his objections to the Government’s claim. Having been previously determined by a final decision of the Board of Tax Appeals, that question did not and could not ‘arise’ in the bankruptcy court.”

A comparison of the exact chronologies of the Kelly case and of this case is most instructive. In both cases bankruptcy intervened before the quasi judicial determination involved became final. In the Kelly case the taxpayer was adjudicated a bankrupt almost two months before this finality attached. In our case the Debtor initiated bankruptcy proceedings somewhat less than two months before such finality. (T. R. 13-14; California Rev. & Tax. Code, Sec. 1614.) Likewise, in both cases the quasi judicial determination became final long before application was made to the Bankruptcy Court for redetermination. In the Kelly case this interval was about two months and a half, while in our case it was almost five months.

It is submitted that the Kelly case is substantially on all fours with our case in its essential operative facts and should therefore be followed here. The only difference between the two cases is that in the Kelly



case the quasi judicial determination was made before bankruptcy, while in our case such determination was made after bankruptcy. However, under the Arkansas rule the quasi judicial determination does not operate as a bar to the power of the Bankruptcy Court under Section 64a(4) *unless the determination has become final*. This factual distinction is, therefore, without legal consequence. This being true, we see no reason why the Kelly case should not be decisive of the instant case. Furthermore, it should be emphasized that if the intervention of bankruptcy has the legal effect that the Debtor here would give it, the Kelly decision would have to be held erroneous since there bankruptcy did intervene before finality attached.

### Conclusion

It is respectfully submitted that a valid and final quasi judicial determination of the challenged assessment having been made some five months prior to the application for redetermination thereof by the Bankruptcy Court, the Bankruptcy Court lacked the power at that time to redetermine the assessment under the rule laid down in *Arkansas Corporation Com. v. Thompson, supra*, and reiterated in *Gardner v. New Jersey, supra*.

Respectfully submitted,

HAROLD W. KENNEDY, County Counsel,  
 ANDREW O. PORTER, Deputy County Counsel,  
 and  
 JAMES A. COBEY, Deputy County Counsel,  
*Attorneys for Appellants.*



No. 11907

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN R. QUINN, County Assessor, and H. L. BYRAM,  
County Tax Collector, of Los Angeles County,

*Appellants,*

*vs.*

AERO SERVICES, INC., a corporation, debtor,

*Appellee.*

---

PETITION FOR REHEARING.

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FILED

FEB 23 1949

PAUL P. O'BRIEN, -

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No. 11907

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*Appellee.*

---

## PETITION FOR REHEARING.

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*To the United States Circuit Court of Appeals for the  
Ninth Circuit, and the Judges Thereof:*

Now comes Aero Services, Inc., a corporation, appellee in the above entitled cause, and presents this its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

### I.

The question at issue is one of national importance in bankruptcy administration and the decision on which rehearing is herein sought enlarges what appellee believes to be the doctrine of *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132, and as so enlarged will lead to



confusion in the administration of bankrupt estates, for the reason that the Bankruptcy Court, which is a court of equity, has the duty and responsibility to protect the rights of creditors as well as other parties in interest. Especially is this true after it receives the assets and assumes jurisdiction. The Bankruptcy Court and the assets being administered should not be affected by acts of other tribunals or by some default on the part of the bankrupt which the creditors, and their successor, the trustee in bankruptcy, have been unable to have determined on the merits by a competent tribunal. In other words, the default of the bankrupt permits creditors to be adversely affected and if they are bound by such default, without redress, assets of the estate to which they have a claim, after that of taxing agencies, will be reduced by arbitrary assessments which the bankrupt has permitted by reason of its laches.

## II.

Prior to the decision of *Arkansas v. Thompson*, *supra*, the Supreme Court of the United States had supported the doctrine announced many times by the majority of the Circuit Courts that the Bankruptcy Courts had the power to fix and determine the amount and legality of tax claims. See *New Jersey v. Anderson*, 203 U. S. 483.

## III.

The Supreme Court in the *Arkansas v. Thompson* case did not reverse *New Jersey v. Anderson*, *supra*, with respect to the statutory power of the Bankruptcy Court. The language of the opinion seems to have been carefully

limited to the particular facts in that case. There it appeared that the trustee in bankruptcy had chosen to seek relief from an alleged erroneous assessment through the State Agencies and the Courts, and after full hearing before those Agencies and Courts on the merits received an adverse decision. The trustee then sought to have the Bankruptcy Court relitigate the issues which he had fully presented to the State Courts. All that the Supreme Court decided in the *Arkansas v. Thompson* case was that upon these facts the taxpayer was not entitled to invoke the jurisdiction of the Bankruptcy Court. In the case of *Gardner v. New Jersey*, 67 S. Ct. 467, the facts are the same as in the *Arkansas* case. The taxpayer there had engaged in extensive litigation before both the State and Federal Courts and upon an adverse determination sought to invoke the jurisdiction of the Bankruptcy Court.

In the instant case the time for objecting to the assessment before the Board of Supervisors sitting as a Board of Equalization had not expired at the time of the bankruptcy proceeding. There had been no hearing, finding, or final order on the tax at the time of the bankruptcy by any State Agency or Court and the taxpayer never sought or had a hearing before the State Board of Equalization, or any other State Agency or Court, nor could he have had such hearing prior to the first Monday in July, 1946.

The taxpayer sought to have the amount of his tax liability determined by the Bankruptcy Court which under the Bankruptcy Act had exclusive jurisdiction of all of its

assets and of all claims of every kind and nature against them. It sought this relief under the express provision of Section 64-a of the Bankruptcy Act by reason of a lien created after bankruptcy against assets in possession of the Bankruptcy Court. It is submitted that the debtor cannot be deprived of that right by default in failing to seek relief before some quasi-judicial agency of lesser jurisdiction. Neither is there foundation for the defense of *res adjudicata* when the taxpayer has not been a party or appeared and had a hearing before any quasi-judicial or judicial body, which is the doctrine upon which the *Arkansas v. Thompson, supra*, and *Gardner v. New Jersey, supra*, are based.

#### IV.

The Bankruptcy Court has jurisdiction to pass upon the validity of a claim where the claim has been reduced under judgment in a State Court and the judgment has become final under the equitable powers of permitting unrepresented creditors to object to an improper claim, and jurisdiction is not lost by a default or a final judgment against the bankrupt company. See *Pepper v. Litton*, 308 U. S. 295.

#### V.

The law as stated by the Supreme Court in *Taylor v. Sternberg*, 293 U. S. 470, 55 S. Ct. 260, is set aside if default is made in applying to the quasi-judicial tribunal, and permits the creation of a lien against assets, to-wit: real property then in possession of the Bankruptcy Court.

The rule is stated in *Taylor v. Sternberg, supra*, as follows:

“Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court’s possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual.”

Wherefore, upon the foregoing grounds it is respectfully urged that this Petition for a Rehearing be granted and that the judgment of the District Court, upon further consideration, be affirmed.

Respectfully submitted,

FRANCIS B. COBB,

*Attorney for Appellee.*

---

### **Certificate of Counsel.**

The undersigned, Francis B. Cobb, attorney for appellee, does hereby certify that in his judgment the above Petition for Rehearing is well founded, and that it is not interposed for delay.

FRANCIS B. COBB.





No. 11908

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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INLAND EMPIRE PAPER COMPANY,  
a Corporation,

Appellant.

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD CONNECTICUT, a Corporation,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Northern Division

FILED

JUN 24 1948

PAUL P. O'BRIEN,

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No. 11908

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United States

Circuit Court of Appeals

For the Ninth Circuit.

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INLAND EMPIRE PAPER COMPANY,  
a Corporation,

Appellant.

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
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Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Northern Division

自 11 月 1 日起  
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OF RECORD

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In the Superior Court of the State of Washington  
in and for the County of Spokane  
No. 119095  
(657)

INLAND EMPIRE PAPER COMPANY,  
a corporation, vs. Plaintiff,  
HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD, CONNECTICUT, a corporation,  
Defendant.

### SUMMONS

The State of Washington to Hartford Steam Boiler  
Inspection and Insurance Company of Hart-  
ford, Connecticut, a corporation, Defendant:

You are hereby summoned to appear within  
twenty (20) days after service of this summons, ex-  
clusive of the day of service, and defend the above-  
entitled action in the court aforesaid, and answer  
the complaint of plaintiff and serve a copy of your  
answer on the undersigned attorneys for plaintiff  
at the address below stated; and in case of your  
failure so to do, judgment will be rendered against  
you according to the demand of the complaint, which  
will be filed with the Clerk of said Court, a copy of  
which is herewith served upon you.

WITHERSPOON, WITHERSPOON  
& KELLEY,

Attorneys for Plaintiff.

Post Office Address:

1114 Old National Bank Building,  
Spokane, Washington.

[Endorsed]: Filed April 2, 1947. [1\*]

[Title of Superior Court and Cause.]

## COMPLAINT

Plaintiff complains of the defendant and for cause of action alleges:

### I.

That the defendant at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and now is and was at all times herein mentioned a corporation engaged in writing liability and other insurance, including machinery breakage insurance in the State of Washington, and authorized to write such insurance.

### II.

That the plaintiff was the owner of certain paper making machinery, including a certain Sumner Steam Engine at the time of its insurance and loss as hereinafter mentioned.

### III.

That on the 5th day of May, 1944, at Spokane, Washington, the defendant, through its authorized representative, in consideration of \$8,914.42, which the plaintiff then paid, executed to it a policy of insurance upon certain paper making machinery, including a Sumner Steam 2-Cylinder Engine with a rating cylinder size of 12 inches, designated at No. 4, on said policy, a copy of which is hereto annexed, marked "Exhibit A" and by this reference made a part of this complaint.

### IV.

That on July 3, 1946, while said Sumner Steam Engine was driving [2] a paper machine at the plant

of plaintiff at Millwood, Washington, and operating in the same proper fashion as it was on May 5, 1944, at the inception of said insurance risk, the control devices on said engine failed to function, causing a sudden overspeed of said engine; that this overspeed was caused by the breaking of the belt which drove the governor on said engine; that the breaking of said belt permitted the governor on said engine to open wide and become inoperative as a governor, causing said engine to race at a speed which caused the following damage to the said paper machine, parts of said engine and plant of plaintiff:

#### Paper Machine

The basement line shaft of said paper machine was twisted from one end to the other for a distance of more than 75 feet, with the result that all six couplings on said line shaft were damaged, and the eight pulleys mounted on said line shaft were all broken; the bearings supporting this line shaft were all damaged; the tops of two concrete piers supporting said line shaft were broken; two driven pulleys on the main floor above said basement line shaft were broken. The shafts supporting these two pulleys were twisted and damaged as well as certain miscellaneous other damage to the paper machine proper. In addition to said damage, the main engine belt was broken as well as all belts driving the different sections. Flying debris damaged fourdrinier wire and further damaged several table rolls.

Summer Steam Engine:

Broken lubricator lines, broken lubricator, severel broken guards and damage to steam lines.

Plant

Various doors and windows, as well as a spare Pickering governor, were damaged and broken by flying debris.

## V.

That said engine and control devices thereon had been inspected by the defendant on December 16, 1945, and passed as satisfactory.

## VI.

That plaintiff notified defendant's agents in Spokane immediately by telephone of the accident and that said agents in turn notified the Seattle Office of defendant, and defendant's Seattle representative phoned plaintiff the evening of July 3 and was further informed of said accident by plaintiff. Said representative, together with other representatives of defendant inspected said damage on July 5, 1946, and on the following day [3] plaintiff furnished defendant with written notice of said accident and subsequently otherwise performed all the conditions of said policy on its part; that with the knowledge and consent of the defendant, plaintiff called in the Union Iron Works of Spokane, which had made part of said machinery and equipment, and with the knowledge, consent and approval of representatives of the defendant, the situation was appraised by the representatives of



said Union Iron Works of Spokane, and said Union Iron Works of Spokane was given an order to make certain castings, line shaft bearings and other work which the plaintiff was not able to do with its own men and equipment under the circumstances. This work included nine pulleys to be cast, machined and balanced, as well as replacing the entire line shaft with couplings and bearings; other work such as wrecking the damaged equipment, replacing the broken piers and erecting all equipment as it was received, as well as machine work on shafting and general repair work while waiting for the new equipment, was done by the maintenance crew of plaintiff with the knowledge, consent and approval of the defendant.

#### VII.

That said machinery, engine and other equipment was not purchased, repaired, assembled and tried until July 29, 1946, when plaintiff was able to once more use said Sumner Steam engine to drive said paper machine.

#### VIII.

That for the direct loss suffered during the period July 3 to July 29, 1946, as a result of said accident of July 3, 1946, plaintiff, at the request of defendant, submitted to defendant a statement of its loss in words and figures as follows:

“Debit Memorandum from Inland Empire Paper Company, Millwood, Washington, September 12, 1946, to Hartford Steam Boiler Ins. & Ins. Co., 707 Arctic Bldg., Seattle, Washington.

We debit your account as follows:

**Overspeeding Engine #4 Accident, 1:45 p.m.,  
July 3, 1946**

Use and Occupancy.....	\$ 7,350.00
Repair Labor, straight time.....	2,524.57
see sheet B	
Repair Labor, premium time,.....	321.19
see sheet B	
Miscellaneous Repair parts drawn from Store Account.....	448.54
see Foreman's Requisitions attached	
Miscellaneous Repairs, not accomplished.....	410.42
see sheet C	
Loss of Fourdrinier Wire .....	198.52
see sheet D	
Belting of Drives.....	280.74
see sheet E	
Union Iron Works, Invoice 360566.....	4,623.77
Supervision and overhead.....	16.06
	<hr/>
	\$16,173.81

Misc. In. ....	7,366.06
Belting .....	280.74
Store .....	5,482.73
Wires .....	198.52
Rep. Lbr. ....	2,845.76

**INLAND EMPIRE PAPER  
COMPANY."**

**IX.**

That defendant did not and has not paid the said loss nor any part thereof, but on October 18, 1946, denied liability therefor under said policy. That defendant was damaged as a result of said accident in the sum of \$16,173.81.

Wherefore, plaintiff prays judgment in the sum of \$16,173.81, and for interest at 6% from the 12th day of September, 1946, and for its costs and disbursements herein incurred.

WITHERSPOON, WITHERSPOON,  
& KELLEY,  
Attorneys for Plaintiff.

State of Washington,  
County of Spokane—ss.

Myron Black, being first duly sworn, on oath deposes and says:

.. That he is the Mill Manager of Inland Empire Paper Company, the plaintiff in the above cause of action, that he has read the above and foregoing Complaint, knows its contents and believes the same to be true.

MYRON BLACK.

Subscribed and sworn to before me this 1st day of April, 1947.

W. V. KELLEY,  
Notary Public in and for the State of Washington,  
residing at Spokane.

[Endorsed]: Filed April 2, 1947. [5]

## EXHIBIT A

The Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a stock company (herein called the Company).

Policy Number 97-743

Insuring Agreement

In consideration of \$8,914.42 premium does hereby agree with Inland Empire Paper Company (herein called the Assured) whose address is Millwood, Washington, respecting loss (excluding loss of the kind described in Section II, and excluding loss of the kind described in Section IV) from an accident as herein defined to an object described herein, occurring during the policy period which is from May 5, 1944, to May 5, 1947, at 12 o'clock noon, standard time, as to each of said dates, at the place where such accident occurs, subject to a Limit per Accident of Fifty Thousand Dollars (\$50,000.), as follows:

Section I

To Pay the Assured for loss on the property of the Assured directly damaged by such accident (or, if the Company so elects, to repair or replace such damaged property), excluding (a) loss from fire (or from the use of water or other means to extinguish fire), (b) loss from an accident caused by fire, (c) loss from delay or interruption of business or manufacturing or process, (d) loss from lack of power, light, heat, steam or refrigeration, and (e) loss from any indirect result of an accident;

## Section II

To Pay the Assured, if loss under Section II is stated above as included but not otherwise, for the extra cost represented by items of expense for temporary repair or for expediting the repair of such damaged property of the Assured including overtime and the extra cost of express or other rapid means of transporting material, but if the Company's payment under Section I is \$1,000 or less the Company's liability under Section II shall not exceed an amount equal to said payment under Section I, and if said payment under Section I exceeds \$1,000, the Company's liability under Section II shall not exceed \$1,000 plus 25% of the amount by which the Company's payment under Section I exceeds \$1,000; and the Company's liability under Section II shall be a part of and not in addition to the Limit per Accident;

## Section III

To Pay, to the extent of any indemnity remaining after payment of all loss as may be required under Sections I and II, such amounts as the Assured shall become obligated to pay by reason of the liability of the Assured for loss on the property of others directly damaged by such accident, including liability for loss of use of such damaged property of others; to Defend the Assured against any claim or suit alleging such damage unless or until the Company shall elect to effect settlement thereof;



## Section IV

To Pay, to the extent of any indemnity remaining after payment of all loss as may be required under Sections I, II and III, if loss under Section IV is stated above as included but not otherwise, such amounts as the Assured shall become obligated to pay by reason of the liability of the Assured, including liability for loss of services, on account of bodily injuries (including death at any time resulting therefrom) sustained by any person and caused by such accident, except that the indemnity hereunder shall in no event apply to any liability or obligation under any workmen's compensation law; to Pay, if loss under Section IV is stated above as included but not otherwise, irrespective of the Limit per Accident, for such immediate surgical relief as shall be rendered at the time of the accident; to Defend the Assured, if loss under Section IV is stated above as included but not otherwise, against any claim or suit alleging such liability unless or until the Company shall elect to effect settlement thereof; and

## Section V

To Pay, irrespective of the Limit per Accident, all costs taxed against the Assured in any legal proceeding defended by the Company in accordance with Section III or IV, all interest accruing after entry of judgment rendered in connection therewith up to the date of payment by the Company of its share of such judgment, all premium charges on

attachment or appeal bonds required in such legal proceedings, and all expenses incurred by the Company for such defense;

Provided the accident happens while the object is in use, or connected ready for use, at the location specified for it in the Schedule. It is Provided Further that this agreement is subject to the Conditions printed hereon and subject also to the Schedules and endorsements issued to form a part hereof. The Schedules and endorsements attached to this policy when it is issued are identified as follows: Schedule(s) numbered 1 to 21 Incl. Endorsement(s) numbered 1, 2.

In Witness Whereof, The Hartford Steam Boiler Inspection and Insurance Company has caused this policy to be signed by its President and Secretary at Hartford, Conn., and countersigned by a duly authorized representative of the Company.

/s/ C. C. GARDINER,  
President.

/s/ C. EDGAR BLAKE,  
Secretary.

Countersigned by:

/s/ FERN FULLMER,  
Authorized Representative.

## Conditions

### Limit Per Accident

1. The Company's total liability for loss from any one accident shall not exceed the amount stated as Limit per Accident. The term "one accident" shall be taken as including all resultant or concomitant accidents whether to one or more than one object or part of an object.

### Bodily Injuries

2. If at the time of an accident there is in effect any other contract or provision requiring any insurance company or any association or individual, or body politic or corporate, to pay the Assured or in his behalf or stead, for loss of a kind described in Section IV caused by the accident, the insurance, if any, under Section IV shall not be considered as contributing insurance and shall become effective and applicable only on any part of said loss of the Assured for which there is not then in effect such other valid and collectible insurance. If at such time there is not in effect any such other contract or provision with respect to such loss then the insurance, if any, under Section IV may be applied to any part of said loss.

### Other Property Insurance

3. In the event of a property loss to which both this insurance and other insurance carried by the Assured apply, herein referred to as "joint loss," (a) the Company shall be liable only for the pro-

portion of the said joint loss that the amount which would have been payable under this policy on account of said loss had no other insurance existed, bears to the combined total of the said amount and the whole amount of such other valid and collectible insurance; or, (b) the Company shall be liable only for the proportion of the said joint loss that the amount which would have been payable under this policy on account of said loss had no other insurance existed, bears to the combined total of the said amount and the amount which would have been payable under all other insurance on account of said loss had there been no insurance under this policy; but this clause (b) shall apply only in case the policies affording such other insurance contain a similar clause.

#### Limitation of Liability

4. (a) The Company shall not be liable under this policy for loss from an accident caused directly or indirectly by strike, riot, civil commotion, acts of malicious mischief, bombardment, invasion, civil war, insurrection, rebellion, revolution, military or usurped power, enemy attack, or by operations of armed forces while engaged in hostilities, whether war be declared or not.

(b) The Company shall not be liable as respects the property of the Assured damaged or destroyed, for more than the actual cash value thereof at the time of the accident. If as respects the damaged property of the Assured the repair or replacement

of any part or parts of an object is involved, the Company shall not be liable for the cost of such repair or replacement in excess of the actual cash value of said part or parts or in excess of the actual cash value of the object, whichever value is less. Actual cash value in all cases shall be ascertained with proper deductions for depreciation, however caused.

### Inspections and Suspension

5. The Company shall be permitted at all reasonable times during the policy period to inspect the objects and the premises where the objects are located. Upon the discovery of a dangerous condition with respect to any object, any representative of the Company may immediately suspend the insurance thereon by written notice mailed or delivered to the Assured at the address of the Assured, as stated herein, or at the location, as stated in the Schedule, of the object to which the suspension applies. Insurance so suspended may be reinstated by the Company but only by endorsement issued to form a part hereof. The Assured shall be allowed the unearned premium paid for such object, pro rata, for the period of such suspension.

### Cancellation

6. This policy may be canceled by the Assured by mailing written notice to the Company stating when thereafter such cancellation shall be effective, in which case the Company shall refund the excess of premium paid by the Assured above the short rate



premium computed in accordance with the Short Rate Cancellation Table printed hereon. This policy may be canceled by the Company by mailing written notice to the Assured at the address of the Assured, as stated herein, stating when, not less than ten days thereafter, such cancellation shall be effective, and the Company shall refund the excess of premium paid by the Assured above the pro rata premium for the expired term. Delivery of such written notice either by the Assured or by the Company shall be equivalent to mailing and whether such notice shall be mailed or delivered the insurance under this policy shall end on the effective date and hour of cancellation stated in the notice. Cancellation shall not affect any claim for loss from an accident occurring prior to the effective date and hour of cancellation.

#### Notice of Accident and Adjustment

7. The Company shall not be liable for loss from an accident unless written notice thereof is given by or on behalf of the Assured or claimant to the Company or to any of its authorized agents, as soon as practicable. The Assured shall give like notice to any claim made on account of such accident. The Company shall have reasonable time and opportunity to examine the property and the premises of the Assured before repairs are undertaken or physical evidence of the accident is removed, except for protection or salvage. Proof of loss shall be made by the Assured in such form and detail as the Company may require. The Assured upon request of the

Company shall render every assistance in facilitating the investigation and adjustment of any claim, submitting to examination and interrogation by any representative of the Company. The Assured shall not voluntarily assume any liability, make any payment or incur any expense, other than at the Assured's own cost except as otherwise expressly permitted herein, or interfere in any negotiation for settlement or in any legal proceeding, without the consent of the Company previously given in writing, but payment by the Assured of any judicial judgment or claim for any of the indemnity for which the Company would become liable under this policy, shall not bar the Assured's right of action against the Company therefor.

### Subrogation

8. The Company shall be subrogated in case of payment of loss under this policy, to the extent of such payment, to all of the Assured's rights of recovery therefor and the Assured shall execute all papers required and shall do everything necessary to secure such rights.

### Suits Against Assured

9. If a suit is brought against the Assured for loss to which this insurance is applicable, the Assured shall immediately forward to the Company every summons or other process served upon the Assured. The Assured upon request of the Company shall aid in effecting settlements, in securing evidence and the attendance of witnesses, and in prosecuting appeals.

### Suits Against Company

10. Suit shall not be brought under this policy unless commenced within fourteen months from the date upon which the accident occurred, except that an action for indemnity payable hereunder as the result of a suit against the Assured may be brought within two years after the termination of such suit; provided that where such limitation of time is prohibited by the laws of the state wherein the loss occurs, then and in that event no suit under this policy shall be sustainable unless commenced within the shortest limitation of time permitted under the laws of that state for such an action.

### Insolvency of Assured

11. To the extent only that any indemnity under this policy becomes finally applicable to loss of the Assured from the liability of the Assured to a third person, the bankruptcy or insolvency of the Assured or his estate shall not relieve the Company of any of its obligations hereunder; and if said person or his legal representative shall obtain final judgment against the Assured or his legal representative because of an accident, then such person or his legal representative may proceed against the Company to recover to said extent on the amount of such judgment, either at law or in equity.

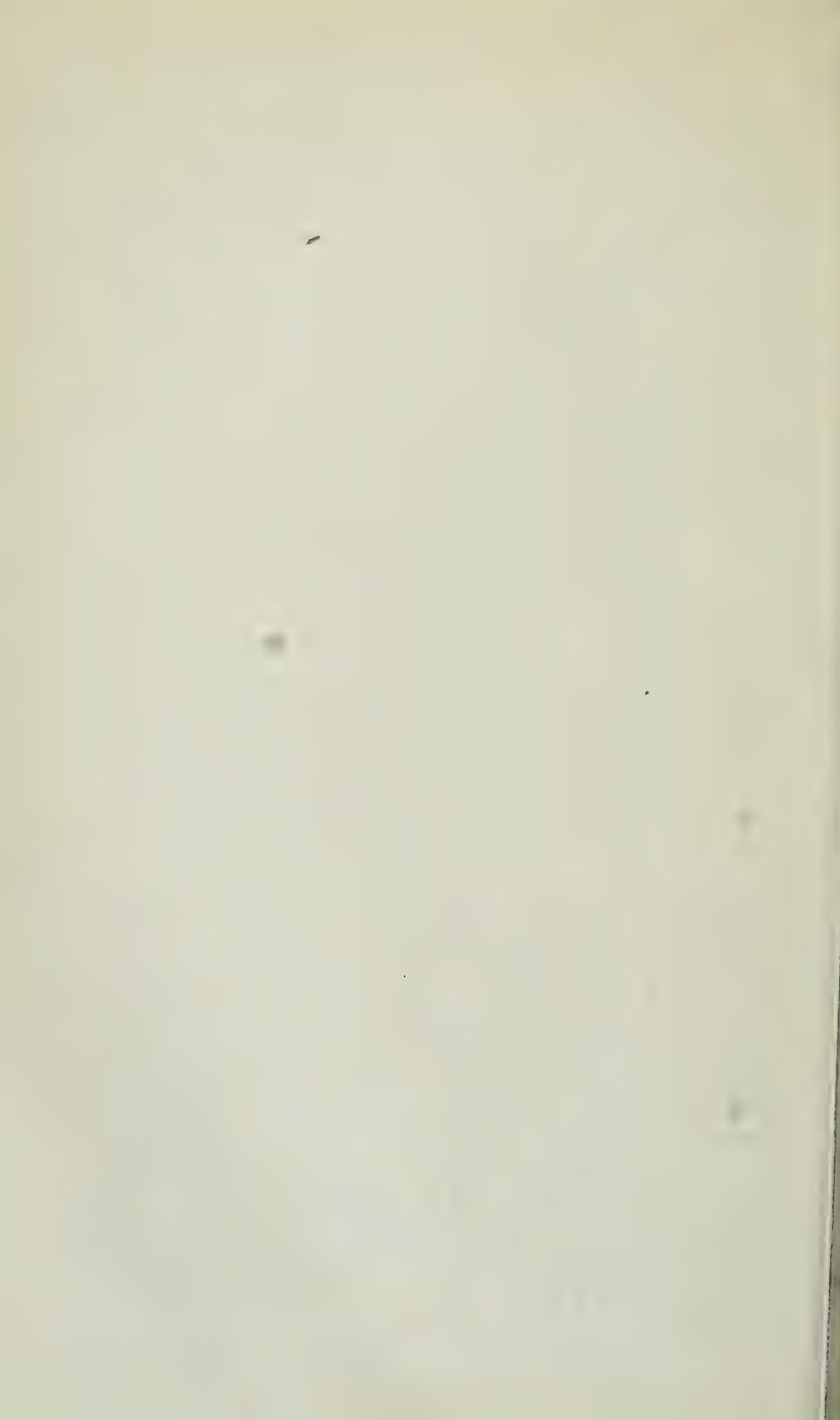
### Changes

12. By acceptance of this policy the Assured agrees that it embodies all agreements existing between the Assured and the Company or any of its

agents relating to this insurance. No provision or condition of this policy shall be waived or altered except by endorsement issued to form a part hereof, signed by the President, a Vice President or the Secretary of the Company. The additional or return premium for any such endorsement shall be computed in accordance with the Adjustment Table printed hereon. Notice to any agent, or knowledge possessed by any agent or by any other person, shall not be held to effect a waiver or change in any part of this policy. This policy shall be void if it is assigned without the written consent of the Company, but if the death, insolvency or bankruptcy of the Assured shall occur during the policy period, the Assured under this policy during the remaining unexpired portion of such period shall be the legal representative of the Assured, provided written notice shall be given to the Company within thirty days after the date of such death, insolvency or bankruptcy.

### Schedules

13. The insurance hereunder shall apply only to loss from an accident to the object or objects designated and described in a Schedule or Schedules issued to form a part hereof, bearing the signature of the President of the Company. Such Schedule or Schedules which contain the description of such object or objects, the definition thereof and the definition of accident and other provisions as applicable to the respective objects described in each such Schedule, shall be considered as incorporated in this policy.





## SCHEDULE

## ENGINES, RECIPROCATING PUMPS AND COMPRESSORS (Except Internal Combustion Type)

Schedule forms a part of Policy No. **97-743** and is in effect from noon of **May 5, 1944**

- INLAND EMPIRE PAPER COMPANY -

The engines, reciprocating pumps and compressors covered under this Schedule are designated as follows:

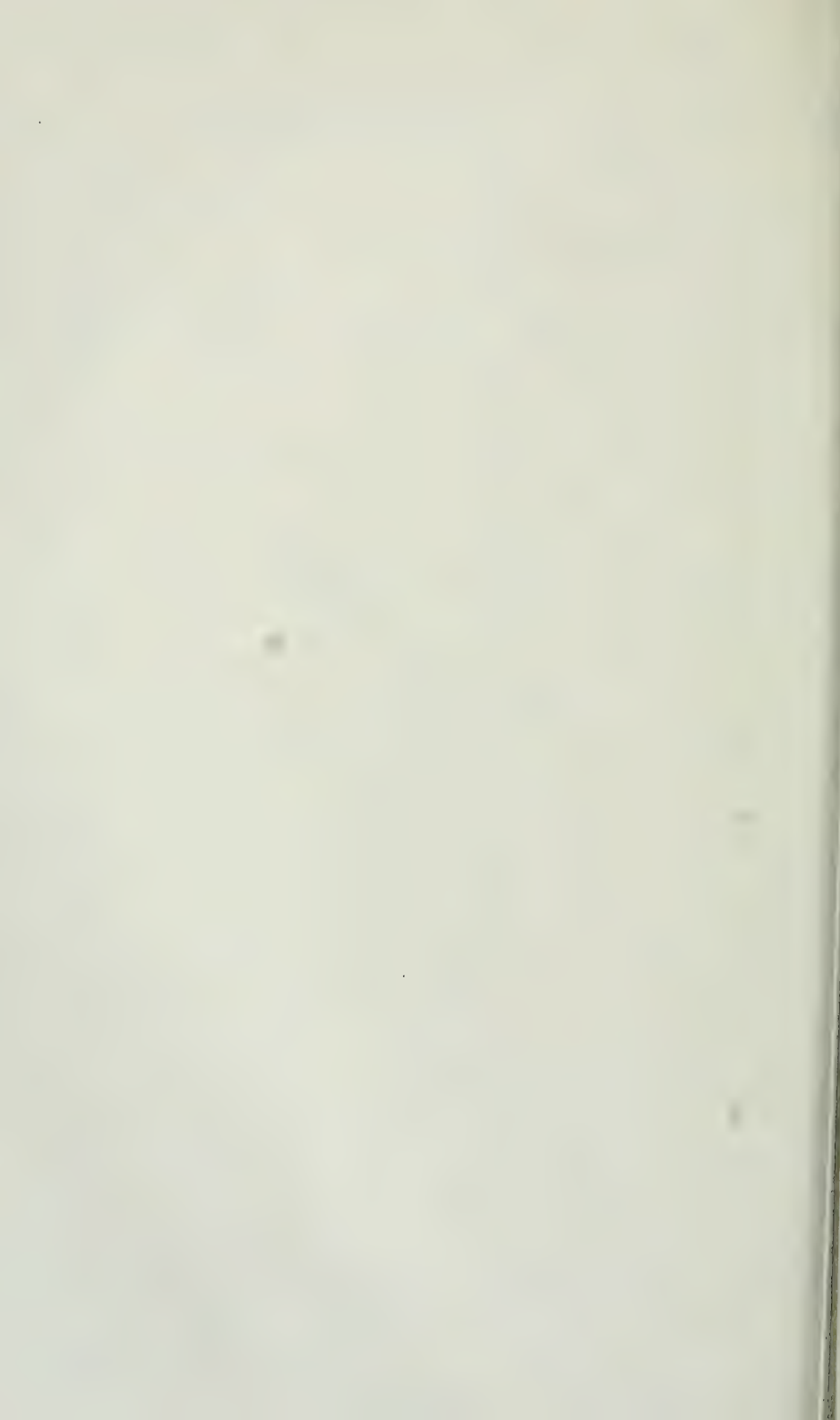
Location **Assured's Plant,** **Millwood,** **Spokane,** **Washingt**  
(Street and Number) (City) (County) (State)

[illegible]

phs B and C printed on the back of this sheet are hereby made a part of this Schedule.

## The Hartford Steam Boiler Inspection and Insurance C

L. C. Gardiner



## Schedule—(Continued)

Engines, Reciprocating Pumps and Compressors  
(Except Internal Combustion Type)

Paragraphs B and C mentioned on the reverse side of this sheet are as follows:

## Definition of Object

B. (a) As respects any such engine, "Object" shall mean the complete engine so described (which shall include any apparatus used as an auxiliary in the operation of the engine and mounted on its frame, and all interconnecting piping between parts of the engine), but shall not include any piping leading to or from the engine, nor the condensor or its connecting pipe (or adapter), nor any electrical machine (other than a governor motor) or part thereof whether mounted with the engine on a common shaft or bed or otherwise, nor any foundation or other structure supporting the engine, nor any mechanism, appliance or shafting connected to the engine by belts, ropes, chains, couplings, gears, pipes or other means.

(b) As respects any such reciprocating pump or compressor described as "Steam Type," "Object" shall mean the complete unit so described, which shall include the driving engine (or driving power cylinders, pistons and connecting parts) and any driven pump or compressor direct-connected or coupled to said driving engine (or said driving parts), together with any apparatus used as an

auxiliary in the operation of the unit and mounted on its frame, and all interconnecting piping between parts of the unit, but shall not include any piping leading to or from the unit, nor the condenser or its connecting pipe (or adapter), nor any electrical machine (other than a governor motor) or part thereof whether mounted with the unit on a common shaft or bed or otherwise, nor any foundation or other structure supporting the unit, nor any mechanism, appliance or shafting connected to the unit by belts, ropes, chains, couplings, gears, pipes or other means.

(c) As respects any such reciprocating pump or compressor described as "Separately Driven Type," "Object" shall mean the complete pump or compressor so described (which shall include any apparatus used as an auxiliary in the operation of the pump or compressor and mounted on its frame, and all interconnecting piping between parts of the pump or compressor), but shall not include any piping leading to or from the pump or compressor, nor any electrical machine or part thereof whether mounted with the pump or compressor on a common shaft or bed or otherwise, nor any foundation or other structure supporting the pump or compressor, nor any mechanism, appliance or shafting connected to the pump or compressor by belts, ropes, chains, couplings, gears, pipes or other means.

#### Definition of Accident

C. As respects any object described in this Schedule, "Accident" shall mean a sudden and accidental

breaking, deforming, burning out or rupturing of the object or any part thereof, which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the object and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing, or shaft seal or diaphragm, shall not constitute an accident, nor shall the depletion of material in any part of the object, due to pitting, corrosion or wear, be construed as an accident.

Endorsement No. 1. Issued 4/19/44

This endorsement forms a part of Policy No. 97-743 and is in effect from noon of May 5, 1944.

Assured Inland Empire Paper Company.

A. In consideration of the premium, the Company hereby agrees to pay the Assured Fifteen Hundred Dollars (\$1,500), herein called the Daily Indemnity, for each day of Total Prevention of Business on the Premises described as Assured's Paper Mill, and located at Millwood, Washington, caused solely by an accident (occurring while this endorsement is in effect) to an object, covered by any of the Schedules of this policy excluding Schedule No. 9, and to pay the Assured a part of the Daily Indemnity for Partial Prevention of Business on the Premises, so caused; all subject to a Limit of Loss of One Hundred Twelve Thousand Five Hundred Dollars (\$112,500) for any one acci-



dent, but the Company's total liability, with respect to one accident under any Schedule described in Column I, shall be limited to the amount shown therefor in Column II, any amount in Column II being a part of and not in addition to the Limit of Loss.

Column I	Column II
Schedules Nos. 1, 3, 4.....	\$111,000
Schedule No. 5.....	\$13,500
Schedule No. 6.....	\$51,000
Schedules Nos. 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.....	\$52,500

B. The Premises are used for manufacturing purposes.

C. The Assured shall send notice of accident, by telegram (at the Company's expense) or by letter, to the Company at its Home Office in Hartford, Connecticut, or at its office at 707 Arctic Building, Seattle, Washington, and upon the arrival of such notice at whichever of said cities it reaches first, shall depend the Commencement of Liability determined with respect to See Endorsement No. 2 in accordance with Paragraph F.

Paragraphs D, E, F, G and H printed on the back of this sheet are hereby made a part of this endorsement.

THE HARTFORD STEAM  
BOILER INSPECTION AND  
INSURANCE COMPANY

/s/ C. C. GARDINER,

President.

/s/ FERN FULLMER,

Authorized Representative.

## Endorsement—(Continued)

## Use and Occupancy (Business)

Paragraphs D, E, F, G and H mentioned on the reverse side of this sheet are as follows:

## Limits

D. The liability of the Company under this endorsement for payment for any one day shall not exceed the amount stated as Daily Indemnity for said day; and the Company's total liability under this endorsement on account of any one accident shall not exceed the amount stated as Limit of Loss. Said amounts shall apply irrespective of the Limit per Accident.

If more than one Assured is named, the Company shall not be liable under this endorsement for any payment in excess of that for which it would have been liable if only one Assured had been named.

## Definitions

E. "Day" shall mean a period of twenty-four consecutive hours, beginning at midnight.

"Total Prevention" shall mean the prevention of all Business on the Premises during all of a day.

"Partial Prevention" shall mean a reduction in Business on the Premises during part or all of a day, sufficient to make the Business for such day less than Current Business. The amount to be paid by the Company for Partial Prevention shall be only that proportionate part of the amount for which it would have been liable for Total Preven-

tion for such day, which such reduction, caused by the accident, from Current Business bears to Current Business.

If the Premises are indicated in Paragraph B as used for manufacturing purposes, "Business" shall mean the production on the Premises of the finished product ready for packing, shipment or sale.

If the Premises are indicated in Paragraph B as used for mercantile purposes, "Business" shall mean the gross sales on the Premises.

If the Premises are indicated in Paragraph B as used for rental purposes, "Business" shall mean the rents collectible from the Premises.

If the Premises are indicated in Paragraph B as used for professional purposes, "Business" shall mean the gross income on the Premises.

"Current Business" shall mean one-third of the total Business on the Premises during the three days next preceding the day of the accident or during any other three days selected by the Assured in any calendar week in the eight calendar weeks, in each of which there has been any Business on the Premises, next preceding the day of the accident.

The definition of "object" and the definition of "accident," as those terms are used in this endorsement, shall be the definition of "object" and the definition of "accident" respectively, each as stipulated for the object in the Schedule covering the said object.

#### Commencement of Liability

F. The liability of the Company under this endorsement for payment on account of an accident

shall commence at a time fixed by the arrival of the notice of the accident as provided in Paragraph C. If the Commencement of Liability is stated as determined with respect to "Time of Accident," the Company shall not be liable for payment for prevention of Business during any period before the twenty-fourth hour prior to such arrival of the notice. If the Commencement of Liability is stated as determined with respect to a midnight, the Company shall not be liable for payment for prevention of Business during any period prior to the specified midnight after such arrival of the notice.

### Limitation of Liability

G. (a) The Company shall not be liable under this endorsement for payment for any prevention of Business resulting from an accident caused directly or indirectly by strike, riot, civil commotion, acts of malicious mischief, bombardment, invasion, civil war, insurrection, rebellion, revolution, military or usurped power, enemy attack or by operations of armed forces while engaged in hostilities, whether war be declared or not.

(b) The Company shall not be liable for payment for any prevention of Business resulting from an accident caused by fire or by the use of water or other means to extinguish fire, nor for any prevention of Business resulting from fire outside of the object, following an accident. The Company shall not be liable for payment for any time during which Business would not or could not have been carried on if the accident had not occurred. The Company shall not be liable for payment for any



prevention of Business resulting from the failure of the Assured to use due diligence and dispatch in the resumption of Business. The period of prevention shall not be limited by the date of the end of the policy period.

(c) The Company shall not be liable for payment for any time during which the resumption of Business is, in any way, curtailed, delayed or interrupted because of any law, or any order or provision having like effect, regulating or restricting, directly or indirectly, the acquisition of material or labor or other means required for the repair of any property damaged or destroyed or for the construction or acquisition of property to replace such property damaged or destroyed or because of the suspension, lapse or cancelation of any license, lease, privilege, right, contract or order.

#### Alternative Provisions

H. The Company may take such means as will in the opinion of the Company permit the resumption of Business, in whole or in part, on the Premises or to supply the functions of the Premises in some other way, or the Company may require the Assured to take such means including the use of any surplus machinery, duplicate parts, equipment, supplies and surplus or reserve stock, which may be owned or controlled by the Assured, any extra expense so incurred at the written direction of the Company to be paid by the Company. The Company may require the Assured to use finished product owned or controlled by the Assured, or similar finished product that may be purchased elsewhere, to substitute for the Business prevented, any extra



expense incurred in the use or purchase of said finished product at the written direction of the Company to be paid by the Company. All such expenses, whether incurred by the Company or by the Assured at the written direction of the Company, shall be a part of and not in addition to the Limit of Loss.

Endorsement No. 2. Issued 4/19/44

This endorsement forms a part of Policy No. 97-743 and is in effect from noon of May 5, 1944.

Assured Inland Empire Paper Company.

With respect to loss under Use and Occupancy Endorsement No. 1, from an accident to objects described in any Schedule named in column A below, the words shown in column B for said Schedule are hereby inserted in the blank space in the fourth line of paragraph C of the said endorsement.

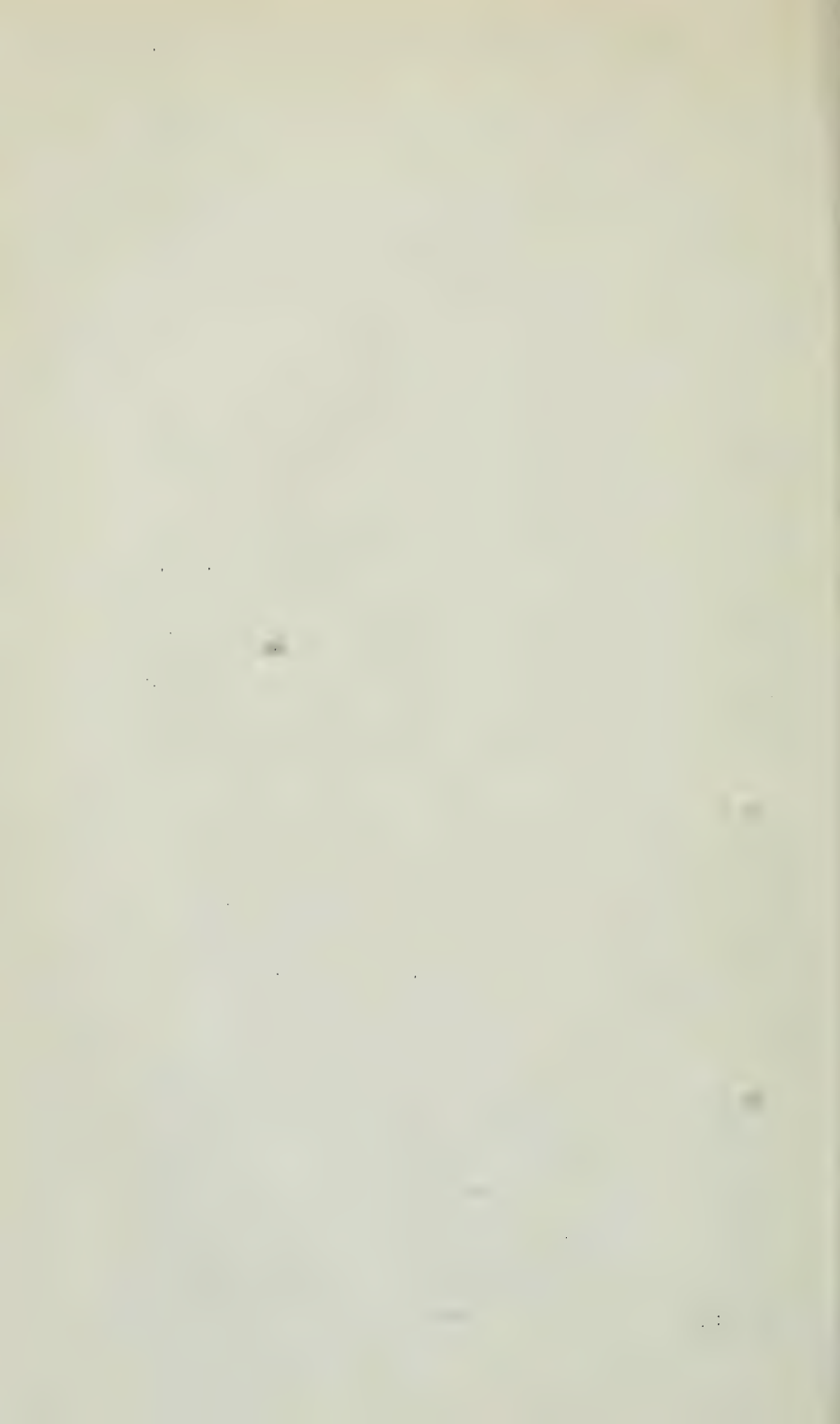
Column A	Column B
Schedules Nos. 1, 3, 4, 5, 6.....	First Midnight
Schedules Nos. 2, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21	Time of Accident

This endorsement is not valid unless countersigned by an authorized representative of the Company.

THE HARTFORD STEAM  
BOILER INSPECTION AND  
INSURANCE COMPANY,

/s/ C. C. GARDINER,  
President.

/s/ FERN FULLMER,  
Authorized Representative.



## ADJUSTMENT TABLE

to obtain the additional premium or return premium which may be required for an endorsement effecting a change in any provision or condition of this policy, determine from the Adjustment Table the percentage for the unexpired term of the policy and apply that percentage to the premium that would be required for such change for the full term of the policy; except that if an object previously covered by the policy is added to the policy the additional premium required shall be equal to the amount which was allowed as the return premium on said object if the period between the date of elimination and the date upon which it is added to the policy is less than three consecutive whole months. Premium adjustments for modifications involving both increased coverage and reduced coverage must not be computed by applying one percentage to the difference in the full term premiums required; additional premiums and return premiums must be computed separately.

the premium for this policy has been determined by applying any discount for risk size, the additional or return premium for any subsequent change shall be determined, with respect to said discount, in accordance with the Company's Manual of Rules and Rates effective at the time of such change.

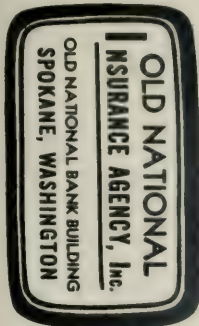
### For an endorsement allowing a return premium

†Unexpired Term (Months)	1 Year Policy	2 Year Policy	3 Year Policy	4 Year Policy
1	7.0%	3.8%	2.6%	2.0%
2	14.1	7.6	5.2	4.0
3	21.3	11.4	7.9	6.0
4	28.4	15.3	10.5	8.0
5	35.4	19.1	13.1	10.0
6	42.4	22.9	15.7	11.9
7	49.7	26.7	18.3	14.0
8	56.8	30.7	21.0	16.0
9	63.8	34.5	23.6	17.9
10	70.8	38.2	26.2	20.0
11	78.1	42.2	28.8	22.0
12	85.1	46.0	31.5	24.0
13		49.8	34.1	25.9
14		53.6	36.7	27.9
15		57.5	39.3	30.0
16		61.3	42.0	31.9
17		65.1	44.6	33.9
18		68.9	47.2	35.9
19		72.8	49.8	37.9
20		76.6	52.5	39.9
21		80.4	55.1	41.9
22		84.2	57.7	43.9
23		88.2	60.4	45.9
24		92.0	63.0	47.9
25			65.6	49.9
26			68.2	51.9
27			70.9	53.8
28			73.5	55.9
29			76.1	57.9
30			78.7	59.8
31			81.4	61.8
32			84.0	63.9
33			86.6	65.9
34			89.2	67.8
35			91.9	69.9
36			94.5	71.8
37				73.8
38				75.8
39				77.8
40				79.8
41				81.8
42				83.8
43				85.8
44				87.8
45				89.8
46				91.8
47				93.8
48				95.8

†The number of Months in the Unexpired Term shall be determined by counting from the effective date of the policy modification to the corresponding day of the month in succeeding months to the expiration of the policy, excluding any fractional part of a month remaining.



PLEASE READ THIS POLICY



THE HARTFORD STEAM BOILER  
INSPECTION AND INSURANCE COMPANY  
HARTFORD, CONNECTICUT

POLICY NUMBER

97-743

ISSUED TO

- INLAND EMPIRE PAPER COMPANY -

Millwood, Washington

ASSIGNMENT OF INTEREST

The interest of the Assured in this Policy is hereby assigned to.....

whose address is.....

with respect to unearned premium and losses from accidents occurring after noon of..... 19.....

subject to the consent of The Hartford Steam Boiler Inspection and Insurance Company.

(Signature of Assured)

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY hereby consents to the Assignment of Interest as made above.

SHORT RATE CANCELLATION TABLE

Showing percentage of premium to be taken as earned premium

Months Policy in Force	One Year Policy	Two Year Policy	Three Year Policy	Four Year Policy
1	21.9	11.8	8.1	6.2
2	29.2	15.8	10.8	8.2
3	36.2	19.6	13.4	10.2
4	43.2	23.4	16.0	12.2
5	50.3	27.2	18.6	14.2
6	57.6	31.1	21.3	16.2
7	64.6	34.9	23.9	18.2
8	71.6	38.7	26.5	20.2
9	78.7	42.5	29.1	22.2
10	85.9	46.4	31.8	24.2
11	93.0	50.2	34.4	26.2
12	100.0	54.0	37.0	28.2
13		57.8	39.6	30.1
14		61.8	42.3	32.2
15		65.5	44.9	34.1
16		69.3	47.5	36.1
17		73.3	50.2	38.2
18		77.1	52.8	40.2
19		80.9	55.4	42.1
20		84.7	58.0	44.1
21		88.6	60.7	46.2
22		92.4	63.3	48.1
23		96.2	65.9	50.1
24		100.0	68.5	52.1
25			71.2	54.1
26			73.8	56.1
27			76.4	58.1
28			79.0	60.1
29			81.7	62.1
30			84.3	64.1
31			86.9	66.1
32			89.5	68.1
33			92.1	70.0
34			94.8	72.1
35			97.4	74.1
36			100.0	76.0
37				78.0
38				80.0
39				82.1
40				84.0
41				86.0
42				88.1
43				90.0
44				92.0
45				94.0
46				96.0
47				98.0
48				100.0





[Title of Superior Court and Cause.]

AFFIDAVIT OF SERVICE

State of Washington,  
County of Spokane—ss.

Evelyn V. Willard, being first duly sworn, on oath deposes and says:

That I am a citizen of the United States and a resident of the State of Washington, and at all times hereinafter mentioned was over the age of 21 years.

That I served the complaint in the above-entitled cause upon Thos. E. Moloney, Vice-President of the Old National Insurance Agency, Inc., agent for the Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a corporation, the defendant, at Spokane, Spokane County, Washington, on the 1st day of April, 1947, by then and there delivering to and leaving with said agent of said defendant a full, true and complete copy of said complaint in the above-entitled action.

EVELYN V. WILLARD.

Subscribed and sworn to before me this 1st day of April, 1947.

W. V. KELLEY,  
Notary Public in and for the State of Washington,  
Residing at Spokane.

[Endorsed]: Filed Apr. 2, 1947.

[Title of Superior Court and Cause.]

### NOTICE

To: Witherspoon, Witherspoon and Kelley, Attorneys for Plaintiff:

Notice is hereby given that the defendant in the above-entitled action, The Hartford Steam Boiler Inspection and Insurance Company, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, will on the 2nd day of May, 1947, at two o'clock p.m., file in the Superior Court of the State of Washington in and for Spokane County, in which court said suit is now pending, its petition and [7] bond for the removal of said cause from said State Court to the District Court of the United States, in and for the Eastern District of Washington, Northern Division, Spokane, Washington.

PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

Received copy of above this 1st day of May, 1947,  
Witherspoon, Witherspoon & Kelley, Attorneys for  
Plaintiff.

[Endorsed]: Filed May 2, 1947.

[Title of Superior Court and Cause.)

## PETITION FOR REMOVAL

Petition of the Defendant The Hartford Steam Boiler Inspection and Insurance Company, a Corporation, for the Removal of this Cause to the District Court of the United States, for the Eastern District of Washington, Northern Division.

The defendant, The Hartford Steam Boiler Inspection and Insurance Company, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, respectfully represents herein as follows:

### I.

The plaintiff, Inland Empire Paper Company, now is and at the time of the commencement of this action was a corporation organized in and existing under the laws of the State of Washington, and now is and at the time of the commencement of this action was a citizen and resident of, and was domiciled in, the State of Washington.

### II.

That the defendant, The Hartford Steam Boiler Inspection and Insurance Company, a Corporation, was at the time of the commencement of this action, and now is, a corporation organized, created, and existing under and by virtue of the laws of the State of Connecticut, and was at the time of the [8] commencement of this action, and now is, engaged in business in the State of Connecticut, having its

principal place of business in the State of Connecticut, and was at the time of the commencement of this action, and now is, a citizen and resident of the State of Connecticut, United States of America.

### III.

That the summons in this action was served upon the Insurance Commissioner of the State of Washington on the 2nd day of April, 1947, and the time to plead, answer or demur to the same has not expired under the laws of the State of Washington as in such cases made and provided.

### IV.

That this action, as appears from the complaint, reference to which is hereby made, is predicated upon a policy of insurance issued by the defendant covering a certain Sumner Steam Engine, and for loss and damages to property of the plaintiff alleged to be covered by said policy of insurance. That the plaintiff claims damages in the amount of \$16,173.81. Defendant denies any liability in any amount whatsoever to the plaintiff and is not liable to the plaintiff in any amount whatsoever. The amount in controversy and dispute between plaintiff and defendant, exclusive of interest and costs, therefore, is and at the time of the commencement of this action was, in excess of the sum of \$3000.00.

### V.

The plaintiff is not a citizen of the same state as the defendant, nor is the defendant a citizen of the same state as the plaintiff. Each of them is a citi-



zen of a different state. The controversy between the plaintiff and defendant in this cause is therefore a controversy which at the time of the commencement of this action was, and still is, entirely between citizens of entirely different states.

## VI.

That defendant has a good and sufficient defense on the merits to the whole of the claim of the plaintiff.

## VII.

The defendant is ready to file and offers to file herewith its bond with good and sufficient surety, for the filing in the District Court of the United States for the Eastern District of Washington, Northern Division, within [9] the time fixed by law, of a certified copy of record in this action and for the payment of all costs that may be awarded in the aforesaid District Court of the United States, for the Eastern District of Washington, Northern Division, if the said court shall hold that this action was wrongfully or improperly removed thereto.

## VIII.

The defendant herein has given the plaintiff proper and reasonable notice of this, its petition for the removal of this action.

Wherefore Your Petitioner Prays to the Court that it proceed no further herein, except to make an order of removal and to direct a transcript of the record made and certified as provided by law.

PAINE, LOWE & COFFIN,

Attorneys for Petitioner.

State of Washington,  
County of Spokane—ss.

Alan G. Paine, being first duly sworn, on oath deposes and says: That he is a member of the firm of Paine, Lowe and Coffin, attorneys for the above-named petitioner and defendant, Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, and its fully authorized agent in this behalf, and has been authorized by the said petitioner and defendant to execute and present the foregoing petition, as its attorney in fact and one of the attorneys for the defendant in this action. That he has personal knowledge of the facts, and the foregoing petition is true in substance and fact, and he makes this verification on behalf of the defendant for the reason that there are no officers of the petitioner and defendant in Spokane County or within the State of Washington.

ALAN G. PAINE.

Subscribed and sworn to before me this 1st day of May, 1947.

M. J. SICKAFOOSE,  
Notary Public in and for the State of Washington,  
Residing at Spokane.

Received copy of above this 1st day of May, 1947.

WITHERSPOON, WITHERSPOON  
& KELLEY,  
Attorney for .....

[Endorsed]: Filed May 2, 1947. [10]

[Title of Superior Court and Cause.]

### ORDER OF REMOVAL

This matter coming on to be heard upon the motion and verified petition of defendant The Hartford Steam Boiler Inspection and Insurance Company, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, praying that this cause be removed into the District Court of the United States for the Eastern District of Washington, Northern Division, upon notice to the attorney of record for the plaintiff; and

The said defendant also presenting a bond in the penal sum of \$500.00, executed by The Hartford Steam Boiler Inspection and Insurance Company, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, a principal, and The Aetna Casualty and Surety Company, as surety, a copy of which bond has heretofore been submitted to counsel for the plaintiff; and

The Court having examined the aforesaid petition and being satisfied the same is well founded, and having examined said bond and being satisfied the same is in conformity with the law; and

The Court having jurisdiction of the subject matter hereof and the parties hereto, and being fully advised in the premises;

It Is Ordered, That this Cause be and it is hereby removed from this Court and into the District

Court of the United States for the Eastern District of Washington, Northern Division, said defendant having presented and filed simultaneously herewith the aforesaid bond in the penal sum of \$500.00, which bond is hereby approved as to form, amount, principal and surety.

Dated this 2nd day of May, 1947.

RALPH E. FOLEY,  
Judge.

Presented by: Alan G. Paine.

[Endorsed]: Filed May 2, 1947. [11]

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[Title of Superior Court and Cause.]

### BOND

Know All Men by These Present, That The Hartford Steam Boiler Inspection and Insurance Company, a Corporation, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, its successors and assigns, as Principal, and The Aetna Casualty and Surety Company, as Surety, are held and firmly bound unto the Inland Empire Paper Company, a Corporation, plaintiff in the above-entitled action, its successors and *and* assigns, in the sum of Five Hundred (\$500.00) Dollars lawful money of the United States of America, for the payment of which well and truly to be made we, and each of

us, bind ourselves and each of our successors and assigns, jointly and severally, by these presents.

The conditions of this obligation are such that whereas, the defendant, The Hartford Steam Boiler Inspection and Insurance Company, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, has applied by petition to the Superior Court of Spokane County, State of Washington, for the removal of a certain cause therein pending, wherein Inland Empire Paper Company, a Corporation, is the plaintiff, and the Hartford Steam Boiler Inspection and Insurance Company, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, is the defendant, to the District Court of the United States for the Eastern District of Washington, Northern Division, for further proceeding, on grounds as set forth in the said petition, and has asked that all further proceedings in said action in the Superior Court of Spokane County, State of Washington, be stayed.

Now, Therefore, if your petitioner, The Hartford Steam Boiler Inspection and Insurance Company, sued herein as Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a Corporation, shall enter in the District Court of the United States, Eastern District of Washington, Northern Division, within the time provided by law, a certified copy of the record in the above-entitled cause and shall pay all costs that may be awarded



therein by the District Court of the United States for the Eastern District of Washington, Northern Division, if said Court shall hold said suit was wrongfully and improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect. [12]

Executed this 1st day of May, 1947.

THE HARTFORD STEAM BOILER INSPEC-  
TION AND INSURANCE COMPANY.

[Seal] By PAINE, LOWE & COFFIN,  
Its Attorneys.

THE AETNA CASUALTY AND  
SURETY COMPANY.

By H. T. ANTHONY,  
Its V. P.

Attest:

LeROY B. WAY,  
Resident Asst. Secretary.

Received copy of above this 1st day of May, 1947.

WITHERSPOON, WITHERSPOON  
AND KELLEY,  
Attorney for .....

[Endorsed]: Filed May 2, 1947.

[Title of Superior Court and Cause.]

CERTIFICATE

State of Washington,  
County of Spokane—ss.

I, Robt. A. Wilson, County Clerk and Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the above and foregoing is a full, true and correct copy of the record in the above-entitled case on file in this office, and which I have been directed to prepare and transmit to the District Court of the United States for the Eastern District of Washington, Northern Division.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court, this 2nd day of May, A.D. 1947, at Spokane, Washington.

[Court Seal] ROBT. A. WILSON,  
Clerk.

By NELS PAULSEN,  
Deputy.

Filed in the U. S. District Court, Eastern Dist.  
of Washington, May 29, 1947.

A. A. LaFRAMBOISE,  
Clerk. [13]

In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division

No. 657

INLAND EMPIRE PAPER COMPANY, a Cor-  
poration,

Plaintiff,

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD, CONNECTICUT, a Corporation,  
Defendant.

### ANSWER

Comes now The Hartford Steam Boiler Inspection and Insurance Company, the defendant in the above-entitled action and misnamed "Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut," by its attorneys, and for answer to plaintiff's complaint alleges as follows:

1. Defendant alleges that the plaintiff, Inland Empire Paper Company, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington. Defendant admits the allegations contained in Paragraph I of the complaint that it was at all times mentioned therein and now is a corporation organized and existing under and by virtue of the laws of the State of Connecticut, but defendant denies the allegations in Paragraph I that it is

or was engaged, in the State of Washington or elsewhere, in writing liability insurance or other insurance of a general nature, including machinery breakage insurance as such; and defendant denies that it is or was authorized to write such insurance; but, instead the defendant alleges that it writes only a single line of insurance known as Boiler and Machinery insurance.

2. Defendant admits the allegations contained in Paragraph II, except that the defendant denies that plaintiff sustained any loss insured against under the policy which defendant issued to the plaintiff.

3. Defendant admits that on the 5th day of May, 1944, at Spokane, Washington, the defendant, through its authorized representative, in consideration of \$8,914.42, which the plaintiff then paid, executed to it a [14] policy of insurance insuring a Sumner Steam 2-Cylinder Engine with a rating cylinder size of 12 inches, designated as No. 4 on said policy, but denies that it issued a policy of insurance upon certain paper making machinery, as alleged in said Paragraph III; and defendant also denies that the copy of the policy annexed to the complaint, marked "Exhibit A" is a complete copy of the policy which the defendant issued to the plaintiff on May 5, 1944, but defendant admits that the copy of the policy annexed to the complaint does contain copies of all of the Schedules and Endorsements applicable to this case.

4. The defendant denies the allegations contained in Paragraph IV; but instead alleges that

at the time of the alleged loss it had in force at the plaintiff's plant, Millwood, Washington, its policy numbered 97-743, which policy defendant issued to plaintiff on or about May 5, 1944, and that said policy covered certain loss from an "accident" to a designated "object" described in Schedule No. 6, which "object" is defined in Paragraph B(a) of Schedule No. 6 of said policy. The defendant specifically denies that there was an "accident" to an insured "object, or any part thereof," within the terms of said policy. The defendant further denies that it has knowledge or information sufficient to form a belief as to whether the plaintiff suffered the damage, or any damage, as set forth in Paragraph IV and therefore, defendant puts plaintiff to its proof. The defendant alleges that if said plaintiff sustained any damage, as claimed, the same was not the result of an accident to an insured object within the policy terms.

5. The defendant admits the allegations contained in Paragraph V; and further avers that the report of inspection, dated December 16, 1945, which defendant sent to plaintiff on or about December 18, 1945, confirmed the fact that, in accordance with a previous recommendation made by the defendant, the governor of said Sumner engine had recently been equipped so that the mechanism would shut the steam supply off in the event the governor belt should break or run off. Defendant, however, denies any inference that it inspected or approved any object which was not insured under the defendant's policy.



6. The defendant admits the allegations in Paragraph VI that [15] plaintiff notified defendant immediately of the alleged accident and forwarded written notice of the alleged accident to defendant's Seattle office; and admits that defendant's representatives investigated the alleged accident on July 5, 1946; and defendant denies that plaintiff sustained any loss insured against under defendant's policy. The defendant admits that with its knowledge and consent, the Union Iron Works, of Spokane, was called in by the plaintiff, but alleges that this was done without prejudice to defendant's rights. The defendant avers that the alleged appraisal made by said Union Iron Works and the subsequent order given to them by plaintiff was made without prejudice to defendant's rights. Defendant further alleges that the work, which plaintiff avers was done by its maintenance crew, was also performed without prejudice to defendant's rights or defenses in this matter.

7. The defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII and, therefore, defendant puts plaintiff to its proof.

8. The defendant denies the inference in Paragraph VIII that plaintiff sustained a direct loss, or any kind of loss whatever, as a result of an "accident," under the terms of the policy, on July 3, 1946, or on any other date. The defendant further denies that the defendant requested plaintiff to submit a statement of its alleged loss. Defendant ad-

mits that plaintiff submitted a statement of its alleged loss in words and figures as set forth in said Paragraph VIII of the complaint.

9. The defendant admits the allegations in Paragraph IX that it did not and has not paid the alleged loss, nor any part thereof, and that on or about October 18, 1946, defendant gave written confirmation of its denial of liability under said policy. The defendant assumes that the last sentence in Paragraph IX has a typographical mistake in that it sets forth that "defendant was damaged \* \* \*" when it intended to aver that "plaintiff was damaged \* \* \*". If defendant's assumption is correct in this regard, it denies that plaintiff was damaged as a result of an accident as defined in the policy in the sum of \$16,173.81, or in any sum.

Wherefore, this defendant demands that plaintiff's complaint be dismissed, together with its costs and disbursements in this action.

ALAN G. PAINE,  
PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

Received copy of above this 29th day of May, 1947.

WITHERSPOON, WITHERSPOON  
AND KELLEY,  
Attorney for Plaintiff.

[Endorsed]: Filed May 29, 1947. [16]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and for its reply to the answer of the defendant denies each and every affirmative allegation, matter and thing in said answer contained.

Wherefore, plaintiff prays for judgment as prayed in its complaint herein.

W. V. KELLEY,  
WITHERSPOON, WITHERSPOON  
& KELLEY,  
Attorneys for Plaintiff.

State of Washington,  
County of Spokane—ss.

Myron Black, being first duly sworn, on oath deposes and says:

That he is Mill Manager of Inland Empire Paper Company, the plaintiff in the above cause of action; that he has read the above and foregoing reply, knows its contents and believes the same to be true.

MYRON BLACK.

Subscribed and sworn to before me this 16th day of June, 1947.

W. V. KELLY,  
Notary Public in and for the State of Washington,  
Residing at Spokane.

Due Service hereof is admitted this 16th day of June, 1947.

PAINE, LOWE & COFFIN,  
Attorneys for Deft.

[Endorsed]: Filed June 16, 1947. [17]

In the District Court of the United States for  
the Eastern District of Washington, Northern  
Division

Civil No. 657

INLAND EMPIRE PAPER COMPANY,  
a corporation,

Plaintiff,

vs.

THE HARTFORD STEAM BOILER INSPEC-  
TION AND INSURANCE COMPANY,  
a corporation,

Defendant.

(Misnamed in the complaint as Hartford Steam  
Boiler Inspection and Insurance Company of  
Hartford, Connecticut, a corporation.)

RECORD OF PROCEEDINGS AT THE TRIAL  
Before: Honorable Sam M. Driver,  
United States District Judge.

Appearances: William V. Kelley, of Witherspoon,  
Witherspoon & Kelley, of Spokane, Washing-  
ton, for the plaintiff; Alan G. Paine, of Paine,  
Lowe & Coffin, of Spokane, Washington, for  
the defendant.

At Spokane, Washington,  
October 7, 8, 9, 10, 1947.

Be it remembered, that on the 7th day of Octo-  
ber, 1947, the above entitled cause came regularly  
on for trial in the above court at Spokane, Wash-  
ington, before the Honorable Sam M. Driver, Judge  
of said Court, sitting without a jury; the plaintiff

appearing by William V. Kelley, of Witherspoon, Witherspoon & Kelley, of Spokane, Washington; the defendant appearing by Alan G. Paine, of Paine, Lowe & Coffin, of Spokane, Washington; Whereupon, the following proceedings were had and done, to wit:

Mr. Paine: If your Honor please, might I introduce Mr. [21] Franklin W. Stevenson, a member of the bar of Kentucky, representing the Hartford Company, and ask that he might assist me in the trial only of this particular case?

The Court: Yes, he may do so; permission granted.

(Mr. Kelley made an opening statement to the Court on behalf of the plaintiff.)

(Whereupon, the Court took a recess for the purpose of viewing the property involved in this case.)

Spokane, Washington,  
Tuesday, October 7, 1947,  
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

MYRON W. BLACK

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kelley:

Q. Your name is Myron W. Black?

A. That's right.



(Testimony of Myron W. Black.)

Q. You're the mill manager of the Inland Empire Paper Company, plaintiff in this case?

A. That's correct.

Q. How long have you been with the paper company?

A. About 25 years.

Q. What is your present position with the company?

A. Well, mill manager.

Q. What is your profession? [22]

A. Well, I'm a graduate in chemical engineering, if that's what you mean.

Q. Whereabouts from?

A. University of Washington.

Q. By the way, can you indicate approximately how long you've been the mill manager there?

A. Four or five years.

Q. During that time you've had supervision of the machinery of the Inland Empire Paper in general, and this Sumner steam engine number 4 in particular?

A. Yes.

Q. You might briefly indicate to the Court the location of the paper company and the type of its manufacturing, for the record.

A. Well, it's located, Inland Empire Paper Company's plant is located at Millwood, Washington, approximately seven miles from the center of the city of Spokane, where we're manufacturing newsprint, sulphide papers. During the war, that period, we manufactured considerable paper from waste paper, but at present we're back on the other grades.

(Testimony of Myron W. Black.)

Q. Directing your attention to this number 4 paper machine, what was the type of paper you were manufacturing, if you recall, back on July 3, 1946?

A. It was known as ground wood drawing. [23]

Mr. Paine: I didn't get that.

A. Ground wood drawing paper.

(Whereupon, a photograph was marked plaintiff's exhibit No. 1 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's exhibit 1 for identification, what is that a picture of?

A. It's a picture of the number 4 machine.

Q. The number 4 paper machine?

A. Yes.

Q. Does that picture accurately portray the situation with respect to the number 4 paper machine on about July 3, 1946?

A. There's only one distinctive difference; we've added a new hood.

Q. Does that have anything to do with the issues in this lawsuit?

A. No.

Mr. Kelley: I might say, if your Honor pleases, Mr. Libby took those pictures just a little while ago. I haven't been able to get him.

Mr. Paine: I'll take a look at it. I don't think I have any objection to it. No objection.

Mr. Kelley: To assist counsel I might say that we have little tabs, if they are desired, to indicate which way the camera was facing. I apprehended

(Testimony of Myron W. Black.)

there wouldn't [24] be any question about it. I wonder if for the convenience of the Court as we go through these exhibits whether we might have the tabs attached?

Mr. Paine: It's entirely agreeable to me.

The Court: All right. As I understand, there is no objection to plaintiff's exhibit 1. It may be admitted in evidence.

(Whereupon, plaintiff's exhibit No. 1 for identification was admitted in evidence.)

Q. (By Mr. Kelley): Whereabouts in your plant is the number 4 paper machine as shown on plaintiff's Exhibit 1? Where is that located?

A. Well, it's the most westerly of the three paper machines.

Q. And on what floor?

A. Well, what we normally term the main floor.

Q. The main floor; and what engine runs that number 4 paper machine?

A. Currently known as number 4 engine, or the Sumner engine.

Q. Was that the engine, that now operates it, was that the same engine that was operating it on or about July 3, 1946?      A. Yes.

(Whereupon, a photograph was marked plaintiff's exhibit No. 2 for identification.)

Q. Directing your attention to plaintiff's exhibit 2 for [25] identification, will you state to the Court what that is?

A. Well, that's a picture of number 4 engine, or the Sumner engine; practically call it a front view.

(Testimony of Myron W. Black.)

Mr. Kelley: Let Mr. Paine see it.

Mr. Paine: Were there any changes on this set-up since July 3, Mr. Black?

A. No changes that I'm aware of.

The Court: That's the number 4 engine, isn't it?

A. Number 4 Sumner steam engine, yes, your Honor.

Mr. Paine: No objection.

Q. (By Mr. Kelley): By the way, where is that Sumner steam engine as shown on plaintiff's Exhibit 2, where is that located in your plant?

A. It's located in the basement, underneath the paper machine.

Q. Underneath the number 4 paper machine shown in plaintiff's Exhibit 1? A. Right.

Q. And does that picture accurately portray the situation with respect to that Sumner steam engine, on or about July 3, 1946?

A. I believe so.

Mr. Paine: May I just ask one question right there? Was there some tightening of the chain to the butterfly valve? [26]

A. You mean had the valve been tightened up inside?

Mr. Paine: No; on the chain that shows in the picture; were they in the same position on the 3rd?

A. There is no material change between that picture than they were at the time of the accident.

Q. (By Mr. Kelley): How is this Sumner steam engine connected to the paper machine shown in plaintiff's Exhibit 1?

(Testimony of Myron W. Black.)

A. By means of a 22-inch rubber belt to a line shaft.

Q. Where is this line shaft located?

A. Just to the west of the Sumner engine, and extending approximately 140 feet along the west wall of the basement.

Q. What did that line shaft consist of at the time of the accident, July 3, 1946, as you recall?

A. Well, there were the shafting itself, there were eight pulleys mounted on the line shaft, the bearings, sole plates, piers, and couplings.

Q. Well, how far away from the Sumner steam engine was this line shaft in the basement, how far to the west?

A. Oh, approximately 20 feet centers, I think.

(Whereupon, two photographs were marked plaintiff's exhibits No. 3 and 4 for identification.)

Mr. Kelley: I'll renew the offer of Exhibit 2.

Mr. Paine: No objection.

The Court: Admitted. [27]

(Whereupon, plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's exhibits 3 and 4 for identification, will you state to the Court what they portray?

A. Well, both Exhibits 3 and 4 are pictures of the line shaft in the basement of this paper machine. Exhibit 3 is taken from just north of the



(Testimony of Myron W. Black.)

engine driven pulley, facing south, and exhibit 4 is taken just south of the engine driven pulley, facing north.

Q. In other words, both plaintiff's exhibits for identification number 3 and 4 accurately portray the main line shaft which was between the Summer steam engine and the number 4 paper machine?

A. That's correct.

Q. Exhibit number 3 shows the southern half of the line shaft, and exhibit number 4 shows the northern half of the line shaft?

A. I think so.

Mr. Paine: These were re-assembled or re-built after the occurrence on July 3, weren't they?

A. That's correct.

Mr. Paine: Is that substantially the [28] same as they were before the occurrence?

A. There's one exception; we had one extra pulley on that line shaft previously, which was not replaced.

Mr. Paine: One pulley which was not replaced?

A. That's right.

Mr. Paine: And where was it located? Where would it appear on either of these exhibits?

A. Located approximately—it was on the other side of this column, and it would be on the other side of this pier, so it must be about in there.

Mr. Kelley: Will you indicate to the Court?

A. I believe it was on the other side of this column, and it would be, I believe, over to the side of this pulley. It was either on this side or the other side of that pulley.

(Testimony of Myron W. Black.)

Mr. Paine: The other side of the pulley is the pulley on the shaft approximately in the center of the photograph, just above the belt?

A. That's correct.

The Court: And you're referring to exhibit number 4, there?

Mr. Paine: Exhibit number 4.

A. It doesn't appear in 3.

Mr. Paine: With that understanding I have no objection.

The Court: All right, identifications 3 and 4 will [29] be admitted.

(Whereupon, plaintiff's exhibit No. 3 for identification was admitted in evidence.)

(Whereupon, plaintiff's exhibit No. 4 for identification was admitted in evidence.)

Q. (By Mr. Kelley): Now, how was the main line shaft, which is shown in plaintiff's exhibits 3 and 4, how was that connected with the number 4 paper machine?

A. Connected by means of belts to pulleys on the main operating floor above.

Q. Located on the upper floor?

A. The upper floor.

Q. The same floor that the number 4 paper machine was on?

A. That's right.

Q. Now, the pulleys of the main line shaft connecting with the pulleys upstairs, those pulleys in the basement were called what?

A. Well, those were driving pulleys.

(Testimony of Myron W. Black.)

Q. And the pulleys upstairs were called what?

A. Driven pulleys, sectional driven pulleys.

Q. Will you show the Court by means of exhibit 3 and 4 where those vertical belts are?

A. There's one shown here, there's another one there, it's in the dark, there's the belt on that section, one there, and there's one there that you can see. [30]

Q. Now, with reference to that number 4 paper making machine shown in exhibit number 1, what do you call that paper machine? What is it called?

A. Well, it's the type normally known as the Fourdrinier paper machine.

Q. And that consisted of how many component parts?

A. Well, there's the wire section, the first press, the second press, the third press, the driers, the calendars, and the reels.

Q. I wonder if you would take the time on exhibit 1, directing the Court's attention to those component parts. In fact—do you have a pen with you? A. Yes.

Q. Maybe you can just label them with a little number, 1, 2, 3, and so forth.

A. This down here would be the wire section.

Q. Just put 1, for wires.

A. All right. This is the first press section in here, that would be 2, second press would be 3, the third press would be 4, and this is the driers, would be 5, and the calender stack and reels do not show.

The Court: That's on number 1.

(Testimony of Myron W. Black.)

Q. In other words, if I follow you correctly, plaintiff's exhibit number 1 shows all the component parts except the reels and the calendar stack?

A. That's right.

(Whereupon, a photograph was marked plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's exhibit 5 for identification, will you state to the Court what that is?

A. Well, this is a picture taken from the—looking towards the northwest, showing the press rolls of the first press and the end of the couch roll. It's a paper making term.

Mr. Kelley: I'll offer plaintiff's exhibit 5 for identification.

Mr. Paine: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

(Whereupon, a photograph was marked plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's Exhibit No. 6 for identification, will you please state to the Court what that portrays?

A. Well, this is a picture of the couch roll, showing the bottom of the rider roll at the end of the wire section.

Mr. Kelley: I'll offer plaintiff's 6 for identification. [32]

(Testimony of Myron W. Black.)

Mr. Paine: This is up on the paper machine?

A. Yes.

Mr. Paine: No objection.

The Court: Is this number 5 still a part of the number 4 paper machine? A. Yes.

The Court: All of those show parts of the machine.

Q. (By Mr. Kelley): I wonder if you would take plaintiff's Exhibit number 1, which shows the general view of the number 4 paper making machine, and take plaintiff's Exhibits number 5 and 6, and indicate to the Court where the close-ups of 5 and 6 are shown on plaintiff's Exhibit 1?

A. This picture is taken from a spot right about here, and this section right here is this section here.

Mr. Paine: Now, you've got your numbers. Could you just identify them so that the record will show?

A. Number 2 would correspond to what is the press rolls in Exhibit 5, and Exhibit 6 would correspond to number 1 in Exhibit 1.

The Court: I see.

Q. (By Mr. Kelley): Now, the number 4 paper machine located on the main floor, what general direction does that run?

A. Well, the paper moves from north to south.

Q. And the machine itself is located in a generally northerly and southerly direction?

A. That's right.



(Testimony of Myron W. Black.)

Q. Is that located directly over the main line shaft in the basement as shown by exhibits 3 and 4?

A. The line shaft is directly against the wall. The machine is somewhat away from it.

Q. I see but in general they approximate each other in their general direction? A. Yes.

(Whereupon, a photograph was marked Plaintiff's Exhibit No. 7 for identification.)

Q. Directing your attention to plaintiff's Exhibit number 7 for identification, will you state what that is, for the record?

A. Well, the principal item in this photograph is the wire driven pulley.

Q. On plaintiff's exhibit number 7?

A. On plaintiff's—yes, on exhibit 7.

Mr. Kelley: I'll offer that.

The Court: 6 hasn't been offered yet, has it?

Mr. Kelley: I'll re-offer 6.

Mr. Paine: No objection.

The Court: Number 6 will be admitted then. [34]

(Whereupon, Plaintiff's Exhibit No. 6 for identification was admitted in evidence.)

The Court: Did you offer number 7, Mr. Kelley?

Mr. Kelley: Yes.

Mr. Paine: No objection.

The Court: Number 7 will be admitted.

(Whereupon, Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

(Testimony of Myron W. Black.)

Q. (By Mr. Kelley): Number 7, by the way, can you indicate to the Court whether that shows any pulley leading down through the floor to the main shaft?

A. You mean a belt leading through the floor?

Q. Yes.

A. I can't see any indication of it, though it's there.

Q. I see; is that the driven pulley for the first wire section?           A. Yes.

The Court: It would be down below and off the picture?

A. You can see a polish from here, where it has been running, but you can't see the belt.

(Whereupon, a photograph was marked Plaintiff's Exhibit No. 8 for identification.)

Q. Directing your attention to plaintiff's exhibit 8 for identification, will you please state what that is? [35]

A. Well, this is a side view showing a portion of the Sumner engine, showing the Pickering governor, the main inlet steam line, the——

Q. Well, if you'll just identify the picture, and then give Mr. Paine an opportunity — I'll offer plaintiff's exhibit 8 for identification.

Mr. Paine: Mr. Black, is this tightener here, and this tightener pulley on this belt, that's been added since 1946, hasn't it, since July?

A. Not to my knowledge it hasn't been added. I don't believe there's been any additions on to that thing since that time.

(Testimony of Myron W. Black.)

Q. (By Mr. Kelley): By the way, for the record, I think I have covered this, but do exhibits 1 to 7, inclusive, and plaintiff's exhibit 8 for identification, accurately portray the situation as it existed in the paper mill on or about July 3, 1946, the date of the accident, all those pictures?

A. I would say they portray as closely as—without material change.

Mr. Paine: But in regard to this arm and tightening pulley—would you call that a tightening pulley? A. It's a rider pulley.

Mr. Paine: Rider pulley, shown on the left hand side of exhibit number 8, to the best of your recollection [36] you think that was on there at the time of this occurrence, and hasn't been added on since?

A. Yes.

Mr. Paine: But you're not definitely positive as to that? A. No.

Mr. Kelley: I'll re-offer plaintiff's exhibit 8 for identification.

Mr. Paine: No objection.

The Court: Admitted.

(Whereupon, plaintiff's Exhibit No. 8 for identification was admitted in evidence.)

Q. (By Mr. Kelley): By the way, you stated a moment ago something in response to counsel's questioning relative to the Pickering governor. Can you show the Court on Exhibit 8, could you outline for the Court the Pickering governor in ink, or—you don't have a white pencil?

(Testimony of Myron W. Black.)

The Clerk: No; I've got red and blue.

Mr. Paine: There's going to be a great deal of discussion, if your Honor please, about the Pickering governor, and I think it would be preferable if the photograph isn't marked in ink.

The Court: Well, I think you can point it out. I think I know what it is.

Witness: Extending from here through the frames there [37] down around that way, would include the entire Pickering governor as shown in that picture.

Mr. Paine: Just for the record, this object in the right upper center of the picture, consisting of where the balls appear and the mechanism below it.

Q. (By Mr. Kelley): Where is the belt of the Pickering governor? Can you show the Court on Exhibit 8?

A. This is the belt that has been under discussion, here and here.

Q. That belt of the Pickering governor of course is a separate, a different belt than runs the main Sumner steam engine? A. That's correct.

Q. By the way, what is a Pickering governor? Just describe it, if you can, briefly, as shown in plaintiff's Exhibit 8.

A. Well, it's a device intended to maintain a constant speed on a steam engine by means of throttling the incoming steam.

Q. By the way, what was the paper speed of the number 4 paper machine at the date of the accident?

A. 346 lineal feet a minute.

(Testimony of Myron W. Black.)

Q. What does that mean?

A. Well, the paper passing through the machine was traveling at that speed. [38]

Q. You mean the number 4 machine, passing through the number 4 machine?

A. That's correct.

Q. Well, how does that correspond to the engine speed of the Sumner steam engine located in the basement, which was driving the number 4 paper machine?

A. Well, the ratio is approximately 2.52; that is, the speed of the engine in revolutions per minute times 2.52 gives you the paper speed in lineal feet per minute.

Q. In other words, there is a difference between paper speed and the speed of the engine?

A. That's correct.

Q. And there is a constant, fixed relationship between paper speed and the speed of the engine?

A. Yes, within a very slight difference.

Q. And in order to ascertain the paper speed of the number 4 machine you multiply the speed of the engine in revolutions per minute by 2.52?

A. Yes.

Q. Well, briefly, what is the function of this Pickering governor?

A. To maintain a constant, set speed of the engine.

Q. Was there any other control device of the Sumner steam engine at the date of the accident?

A. There was an overspeed stop. [39]



(Testimony of Myron W. Black.)

Q. What do you call that?

A. Well, there's a ball mounted on the flywheel of the pulley—excuse me, a ball mounted on the rim of the pulley, held off by means of a spring. When the centrifugal force of that pulley is such a force that ball towards the rim and overcome the action of the coil spring, it pushes a rod out beyond the rim of the pulley and contacts a trigger, which in turn is connected to a butterfly valve on the incoming steam line——

Q. On the main steam line?

A. On the main steam line, which closes by gravity when the trigger is released on the flywheel.

Q. How far is that stationary trigger to the face of the engine drive pulley?

A. I think within a half to three-quarters of an inch.

Q. What is the butterfly valve?

A. Well, the butterfly valve is a body with a valve, a stop, mounted center, with a pivot, mounted on a pivot, so that the pressure on it does not retard its opening or closing.

Q. Well, what is it used for with respect to the steam line?

A. As an emergency stop.

Q. Emergency closing of the steam line?

A. That's right.

Q. Well, directing your attention to—would it show on plaintiff's Exhibit 8? [40]

A. Yes.

Q. I wonder if you could show the Court on that exhibit the butterfly valve?

(Testimony of Myron W. Black.)

A. The butterfly valve, this is the pivot of it, a flange on that side, a flange on this side; it's right behind here.

Q. You were in the mill on July 3, 1946?

A. That's right.

Q. You arrived on the premises shortly after the accident?

A. I was on the premises, but not near the machine.

Q. I see. You made an investigation, however, of the Sumner steam engine and the main line shaft and the number 4 paper machine?

A. That's right.

Q. Did the Pickering governor function on the day of the accident?

Mr. Paine: I object to that as a conclusion. I think Mr. Black ought to state when he was there and what he observed. He said he wasn't there at the time of the accident. I'd like to have him place it as to when he was there, and what he first observed.

The Court: I'll sustain the objection on the form of the question.

Q. (By Mr. Kelley): Did you observe any part of the Pickering governor when you arrived at the scene shortly after the [41] accident?

A. No, I can't say that I observed the Pickering governor in detail.

Q. Well, I don't mean in detail, but did you observe the belt of the Pickering governor? Did you see the belt of the Pickering governor?

(Testimony of Myron W. Black.)

A. I saw a broken belt; the Pickering governor belt was broken.

Q. And where was it lying?

A. Where it would normally drop after it was separated.

Q. And where was that?

A. Across the frame underneath the governor. One end was across the frame of the engine.

Q. Will you show on Exhibit 8 the belt of the Pickering governor, once more to the Court?

A. This was the belt.

The Court: That's the prominent belt in the left foreground? A. Yes.

Q. In exhibit 8? A. In Exhibit 8.

Q. That is not the same belt, for example, as shown in Exhibit 4, driving from the Sumner steam engine to the main line shaft? A. No. [42]

Q. Do you have that belt of the Pickering governor?

A. No. We may have the belt, but there are no identifying marks on it.

Q. Well, who has it? Do you know who has it?

A. Well, the break was trimmed off as evidence shortly after the accident, and I do not have the belt nor the break that was trimmed.

Q. By the way, how soon did you come on the scene of the accident?

A. Oh, 10 or 15 minutes.

(Whereupon, a photograph was marked plaintiff's Exhibit No. 9 for identification.)

(Testimony of Myron W. Black.)

Q. You mentioned that the butterfly valve was used for emergency closing of the steam line. Directing your attention to plaintiff's Exhibit 9 for identification, will you state to the Court what that is?

A. Well, that's the hand pull on the main floor connecting to the safety pin on the butterfly valve.

Mr. Kelley: I'll offer plaintiff's Exhibit 9 for identification.

Mr. Paine: No objection.

The Court: Admitted.

(Whereupon, plaintiff's Exhibit No. 9 for identification was admitted in evidence.)

Q. (By Mr. Kelley): How is that connected with the butterfly [43] valve you were discussing a moment ago?

A. By means of a chain through a pipe and to a link on the arm of the butterfly valve.

Q. Does this chain go through the floor above the Sumner steam engine? A. Yes.

The Court: You stop the engine by pulling up on the handle of that rod, is that correct?

A. Yes, sir.

(Whereupon, a photograph was marked plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's Exhibit 10 for identification, what does that exhibit for identification portray? Does that show the chain going through the floor?

(Testimony of Myron W. Black.)

A. That shows the safety chain here, that was under discussion on the previous exhibit, Exhibit 9, where it extends from the floor level down to the governor.

Mr. Kelley: I'll offer Exhibit 10 for identification.

Mr. Paine: Taken from the basement, looking up to the floor where exhibit No. 9 shows the handle going down through a pipe? A. That's right.

Mr. Paine: And then this would be looking from the floor up to the same place? [44]

A. That's right.

Mr. Paine: No objection.

The Court: Number 10 will be admitted.

(Whereupon, Plaintiff's Exhibit No. 10 for identification was admitted in evidence.)

(Whereupon, a photograph was marked plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's Exhibit No. 11 for identification, will you state to the Court what that is?

A. This is a close-up view of the overspeed stop, showing the ball and the trigger.

Q. Is that a picture of what you termed a moment ago the Brownell overspeed stop?

A. Yes.

Q. And will you state once more how that Brownell overspeed stop functioned?

A. The centrifugal force——



(Testimony of Myron W. Black.)

Mr. Kelley: First I'll offer Exhibit 11 for identification.

Mr. Paine: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 11 for identification was admitted in evidence.) [45]

Q. (By Mr. Kelley): Using 11 for illustrative purposes, will you indicate to the Court how the Brownell overspeed stop was supposed to function?

A. Well, the speed of the flywheel being sufficient, the centrifugal force will push this ball out on a pin and overcome that spring. This rod here extends out far enough to catch that trigger, trips the mechanism, and releases this chain which extends up to the butterfly valve, and it closes by gravity.

Q. By the way, had the defendant Hartford Insurance Company ever tested this Brownell overspeed stop before the accident?

A. My understanding, it has been tested a good many times by them.

Q. Well, approximately when was the last, if you recall of your personal knowledge?

A. This I was told by the representative, it was tested in December.

Mr. Paine: Somebody told you?

A. I was told by their representatives, that it was tested in December.

Q. December of what year?

A. 1945.

(Testimony of Myron W. Black.)

Q. Less than six months before the accident?

A. Yes. [46]

Q. How did the representative test it?

A. By speeding the engine to the place where the overspeed stop released the trigger.

Q. Who was the representative?

A. Mr. Olinger.

Q. H. L. Olinger? A. That's right.

Q. Now, what are the ways that you effect an emergency closing the butterfly valve?

A. Well, it's either closed by hand, or this chain from the upper floor or by the overspeed stop.

Q. Or the trigger trip on the Brownell overspeed stop? A. Yes.

Q. As shown on Exhibit 11?

A. Or it can be closed anyplace by pulling the pin link in the chain.

Q. Where are the hand trips located?

A. Well, the one hand trip essentially is located on the operating floor above the engine.

Q. Alongside the driers on the north end of the floor, above the engine? A. That's right.

Q. Once more will you indicate, I think it's on plaintiff's Exhibit 9, to the Court that handle.

A. Well, that's the handle. [47]

The Court: Yes, I remember it.

Q. That day what was your paper speed on the number 4 machine? A. 346 feet per minute.

Q. What grade of paper have you manufactured at the highest speed on the number 4 machine?

(Testimony of Myron W. Black.)

A. Normally we manufacture newsprint at the highest speed on that machine.

Q. And what is that speed, about?

A. I believe the highest speed is about 690.

Q. That's the paper speed?

A. That's the paper speed.

Q. And that is equivalent to how many R.P.M.'s of the Sumner steam engine?

A. Approximately 270.

Q. When was the last time that that paper machine, that number 4 machine, was operated at that speed?

A. I believe around 1941.

Q. Now, after the accident, where was this 22-inch engine belt as shown in plaintiff's Exhibit 4?

A. That engine belt—well, let's see; the shafting pulled north-eastward.

Q. I think 3 would show it better.

A. Well, this is the direction.

Q. Show it to the Court so he understands it.

A. This is the direction, and this shafting, this pulley was twisted and bent, but this hub of the pulley landed somewhere in this spot here, and the belt with it.

Q. You're indicating a box-like structure in the right-hand corner of Exhibit 4, as where the drive pulley of the Sumner steam engine landed?

A. The driven pulley. Normally the belt would be lying in an east-west direction, and after the accident it was lying something like that.

(Testimony of Myron W. Black.)

Q. Well, by "that" what direction do you mean, for the record?

A. Northwesterly; southeasterly-northwesterly.

Q. In other words, was the line shaft going through the engine belt? A. Yes.

Q. And if I follow your testimony correctly, parts of the main line shaft, that is, the hub of the main line shaft engine driven pulley was resting some 10 feet northeast of its original position?

A. That's correct.

Q. As shown on Exhibit 4; and the engine belt was thrown diagonally across the room, is that it?

A. Yes, in that direction.

Q. Was there any noticeable increase of speed in the engine that accompanied the break-up of this machinery? [49]

Mr. Paine: I object to that——

The Court: I'll sustain the objection. I understood the witness wasn't present when the break occurred.

Mr. Paine: 10 minutes after the occurrence was over.

Mr. Kelley: Then at this juncture I wonder if I could interrupt this witness on direct and call some other short witnesses on that specific point?

The Court: I have no objection if Mr. Paine hasn't.

Mr. Paine: No, I haven't.

(Whereupon, the witness Myron W. Black was temporarily excused from the witness stand.)

## RALPH O. JANOSKY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Kelley:

Q. Your name is Ralph O. Janosky?

A. Janosky.

Q. And you were the back tender on the number 4 machine at the time of this accident on July 3, 1946?

A. Yes, sir.

Q. By the way, how long have you been employed by the Inland Empire Paper Company?

A. Four years.

Q. And what end of the number 4 paper machine were you working on? [50]

A. I work on the dry end.

Q. What is the dry end, north or south?

A. The dry end is the south end.

Q. The dry end is south?

A. Yes, sir.

Q. And do you recall the accident on July 3, 1946?

A. Yes, sir.

Q. And where were you at the time just prior to the break-up?

A. I was standing at the dry end, just inside the door, a short distance from the calendar stack, alongside of the winder, you might say.

Q. Will you take plaintiff's Exhibit 1 there, and indicate to the Court just about where you were?

A. Well, at the time of the accident I was standing just inside this door, right in here. This would be just past the end of the driers and the calender stack, just beyond that, alongside the winder, just inside this door.



(Testimony of Ralph O. Janesky.)

Mr. Paine: On the extreme left center of the picture?      A. Yes.

Q. About how far from the paper machine?

A. I would say approximately 25 or 30 feet.

Q. And how did you first notice anything was wrong?

A. The first I noticed was wrong was the paper snapped off [51] between the driers and the calender stack.

Q. Well, is there anything unusual in that?

A. Well, there's—yes; as a rule it doesn't do that unless there is something the matter.

Q. Well, just tell the Court in your own words what you started to do and where you were when you noticed the machine was running away. Just tell it in your own words.

Mr. Paine: Object to that question, your Honor.

The Court: Well, it assumes the machine was running away, but the Court will consider that part of the question not evidence. Go ahead.

A. At that particular time I was standing, as I said, just inside the door talking to Mr. Janecek, and the paper snapped between the calender stack and the driers, the sheet broke and was running on the floor between the driers and the calender stack; I was talking to Mr. Janecek, and I started to go over to put the sheet back through the calender stack, get it back on the reel, and just as I left to do that I noticed the machine was running faster than it had been, than the speed we were making paper, and as I noticed that, as soon as I noticed

(Testimony of Ralph O. Janosky.)

it was running at a higher rate of speed than we had been making paper, I realized the machine was running off, and I left there and run to the wet end of [52] the driers, it would be to the north end of the driers, to pull the safety pin to stop the engine.

Q. What sound did you hear as you were running to pull the pin?

A. Well, I could tell by the sound of the machine, the regular run of the machine, the speed it has; it was picking up speed, you could tell that by the sound of it; it was gathering speed.

Q. Well, did you pull the safety pin?

A. I arrived at the safety pin at the same time as Mr. George Leitner. Mr. George Leitner came from the wet end; he with some other fellows, machine tenders, were working at the wet end, and they were down there, and George came from the wet end, and we both arrived at the safety pin about the same time; we both took hold of it and pulled it about the same time.

Q. What would you say about the speed of the machine with reference to its paper-making speed, at that time? Was the speed that it was going faster or slower than what it made paper at?

A. It was much faster than we were making paper that day.

Q. What, if anything, did you observe as to the pulp or the stock?

A. Pardon me; do you mean after I got to the wet end?

Q. Yes. [53]

(Testimony of Ralph O. Janosky.)

A. When I got to the wet end the machine was traveling so fast the pulp, the paper pulp, traveling over the felts, the felts were going so fast the felts were flopping and the pulp was flying in the air.

Q. How high was the pulp going?

A. I would estimate it was flying between four and five feet.

Q. Directing your attention to plaintiff's 5, for illustrative purposes, will you indicate to the Court there where you saw the pulp, and the general location of it in the air?

A. Well, the pulp here would be coming from the felts, and in this picture you see the first felt. It was flying here. It comes from the wire to the couch roll through the press, then it travels along on top of this felt to the second felt, takes off right here on to the second felt; well, this felt was flopping in the air and pulp was flying up.

The Court: That's at the left hand of the picture, there?

A. Yes, sir.

Q. Did you hear any noises after you pulled the safety pin?

A. Yes, sir.

Q. And what were they, if you know?

A. Well, there were pieces breaking and pieces flying through the air. I heard pieces hitting on the floor, from in [54] the basement, and I heard pieces hitting on the roof of the upper floor. The machinery was breaking.

Mr. Kelley: You may inquire.

(Testimony of Ralph O. Janosky.)

Cross-Examination

By Mr. Paine:

Q. Now, this pulp comes across there in a sort of a sheet, more or less, wet and cohesive, but not really dried into paper yet, is that it?

A. That's true.

Q. And the felts underneath were flapping maybe a couple of inches, or an inch, something like that, little vibrations?

A. They were flopping more than that, at that speed.

Q. About how much was the felt flapping?

A. Well, I would say it was—I really didn't pay much attention, but I would say it was flopping, I'd say, around six inches.

Q. And that would give an impetus, and pieces of this pulp would fly up in the air?

A. Yes.

Q. The whole stream of pulp didn't fly up?

A. No.

Q. Just particles would break off?

A. That's right, it was breaking off.

Q. You didn't really attempt to estimate how far they were going up? It was just breaking off?

A. That's right, it was flying in the air, particles of it. [55]

Q. And you say after you, or Leitner pulled the trigger pin, is that right; you didn't actually pull it?

A. We both took hold of it and pulled it at the same time, then when George left, it seemed to me the engine kept going, and I took hold of the chain the second time, after Mr. Leitner had left, I took hold of it and gave it another pull myself.



(Testimony of Ralph O. Janosky.)

Q. After you and Leitner first took hold of it and pulled up the handle that shows there in number 9, the handle came up through the pipe that it's in, didn't it?      A. Yes, sir.

Q. This handle here, you both took hold of that and gave it a pull up maybe a foot, foot and a half, something like that?      A. That's right.

Q. And the machine kept operating?

A. Apparently so, yes, sir.

Q. Apparently so, and you went back a second time to give this a pull?      A. Yes, sir.

Q. And how long after that was it that the noises stopped and the machine began to slow down?

A. Well, it was after that, when we pulled the safety pin, I left and started shutting the felts off. I started to shut the felts off, and pieces began flying and hitting [56] the roof, and hitting the floor, and I decided that was a poor place to be staying around. I looked around and everybody else was on their way, so I took off, too.

Q. That was a pretty good place to get out of; quite a bombardment was going on; mostly down below, wasn't it, coming up and hitting the floor you were standing on?

A. Down below, yes, sir, and upstairs, too.

Q. Some of the pieces were flying upstairs, around the paper machine?      A. That's right.

Q. So after you gave it the second pull and the bombardment was still going on, you decided it was a good place to get out of?      A. That's right.

Q. And you did get out of the room?



(Testimony of Ralph O. Janosky.)

A. I didn't leave the room, no, sir. I started to run and as I started to run toward the door, the machine was slowing down, and I didn't leave the room entirely.

Q. You ran towards the door and by that time the machine was coming to a stop?

A. That's right.

Q. And slowing down? A. Yes, sir.

Q. And where did you go after that? Did you go on out of the building, or wait around? [57]

A. No, I stayed around; after it was over I went back and kind of cleaned up a little there, to get ready to lift the presses and the like, to leave the machine, because it wouldn't be running.

Q. Did you do any pulling of a whistle for the engineer? A. Yes, sir.

Q. When did you pull the whistle for the engineer?

A. I pulled the whistle string just after I pulled the safety pin.

Q. After you and Leitner pulled the safety pin, you went over and pulled the whistle for the engineer? A. Yes, sir.

Q. And where is the cord or the thing you pull to whistle for the engineer?

A. It's right near this safety pin; it's right at the same end of the drier; they're right there together.

Q. Maybe five or ten feet away from it?

A. No, not that far.

(Testimony of Ralph O. Janesky.)

Q. And you went over and pulled that four times?      A. Yes, sir.

Q. Whistling for the engineer, and after you blew that, did you do something to the clutch levers?

A. Yes, sir, I started to shut the felts off.

Q. That's what you meant before when you said you were shutting the felts off? [58]

A. Yes, sir.

Q. What sort of an operation is that? Do you let out a clutch similar to operating an automobile?

A. No, the clutch operates on a lever; a lever mounted on a shaft that goes under the clutch itself is on the back side of the machine, and that operates from a shaft that comes through under the machine, with a handle on this end that raises and lowers to engage the clutch.

Q. How far is that mechanism from the engineer whistle pull?

A. The one to the third press is right close. The third felt comes right up, you might say, right up to the driers, and the clutch lever for the third press is, I'd say it isn't over about—approximately six feet, six or eight feet from the pin.

Q. So you just had to step over a couple of steps to the clutch lever?

A. That's it; that's to the third one, then the clutch lever to the second press is down below that; the length of the press there would be, oh, I'd say twelve or fifteen feet, probably.

Q. So you went to the first clutch lever and released it and then went on twelve or fifteen feet and released the other clutch lever?

(Testimony of Ralph O. Janosky.)

A. I released the second felt first; I went to the second felt and threw it out, went back to the third, picked it [59] up, and as I picked the lever up to throw the third felt out, I seen the lever from the second fall down in again. I was in a hurry and it just didn't stay up. It started to fall back in again, and I run back to that and by that time——

Q. Things were really popping by that time?

A. Things were popping, and that's when I started to depart.

Q. Did the releasing of the clutches seem to add to the increase of the engine and the noise and confusion down below, when that load was taken off?

A. I wouldn't say that it added much to it. There was quite a bit of popping and breaking going on at that time, so there was noise going on, and I couldn't say whether the machine gained speed. It was going at a terrific speed at that time.

Q. Could you fix about when the first noise of the breaking—first you observed the increase in speed of the machine, and saw the pulp flying, then when was it you first heard the break-ups? I understand that was after you pulled the safety stop with Leitner and had gone back to the clutches, or after the clutches were put in; which was it?

A. Well, the breaking noise, I first noticed it was after the safety chain was pulled.

Q. Well, was it after you had blown the whistle for the [60] engineer?      A. I'd say it was.

Q. You say it was after that?

A. I believe so.

(Testimony of Ralph O. Janosky.)

Q. And maybe after you had taken the clutches out?

A. No, I wouldn't say, because—I'd say that the noise was going on at the time that I was throwing the clutches out.

Q. What effect did the pulling of the clutches have on this number 4 paper machine? Did it bring it to a stop or did the slipping back of the clutch keep it going again?

Mr. Kelley: That's improper cross-examination, if the Court please.

Mr. Paine: He's here telling all the facts and circumstances, what he saw. All I asked is what he observed.

The Court: I'll overrule the objection, with the understanding that it's what he observed, and not as to causes, or whether one led to another.

Mr. Kelley: I wouldn't have any objection if the question were framed that way.

The Court: Perhaps you had better re-frame it.

Q. After you pulled the clutches, did you observe anything as to the speed of the paper machine, what happened?

A. The paper machine?

Q. Yes. [61]

A. That would refer there to the driers?

Q. Yes, that number 4 paper machine, on which these clutches operate, is that right?

A. These clutches run the felt, and the driers are operated by a different clutch; there's a different lever that runs those.

(Testimony of Ralph O. Janosky.)

Q. Then what effect did it have, if any, on the felts?

Mr. Kelley: Well, I object to that.

Q. What did you observe in regard to the felts?

Mr. Kelley: If you did.

A. Beg your pardon?

Q. Did you observe any change in the operation of the felts after you operated the clutches?

A. Well, inasmuch as the clutch was thrown out, the felts would slow up, naturally; they'd stop.

Q. Well, "naturally"; what I'm getting at, did you observe whether they stopped or didn't stop?

A. Well, they were stopping. Of course, they don't stop when you throw the clutch out; at the speed at which they were traveling it takes a short time for them to come to a stop.

Mr. Paine: That's all.

#### Redirect Examination

By Mr. Kelley:

Q. Each part of the number 4 paper machine has different clutches, Mr. Janosky? [62]

A. That's right.

Q. And frequently in the operation of the number 4 paper machine, while you're making paper, it becomes necessary to release these various clutches from time to time?

A. That's right.

Q. And that has no effect of speeding up the Sumner steam engine in the basement, does it?

Mr. Paine: Now, I think if Mr. Kelley is going to project into that——



(Testimony of Ralph O. Janosky.)

The Court: That question is leading; I'll sustain the objection.

Q. (By Mr. Kelley): Well, does the normal release of these various clutches in the operation of the number 4 paper machine cause any increase in speed?

Mr. Paine: Well, I object to that. I think you must qualify a mechanical engineer. This boy was operating the machine. I understand he wasn't qualified; all I asked is what he saw the paper machine do.

The Court: I'll sustain the objection.

Q. (By Mr. Kelley): Have you ever observed the number 4 paper machine speed up as a result of throwing out the various clutches from time to time in the operation of the paper machine?

A. No.

Mr. Kelley: That's all. [63]

(Whereupon, there being no further questions, the witness was excused.)

(Short recess)

(All parties present as before, and the trial was resumed.)

### GEORGE LEITNER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Kelley:

Q. Your name is George Leitner?

A. Yes, sir.

(Testimony of George Leitner.)

Q. You were the machine tender on the number 3 machine around 2 p.m. on July 3, 1946, at the paper company?      A. I was.

Q. Can you show the Court from plaintiff's Exhibit 1 there on the easel just about where you were working at that time?

A. Well, it would be right about here; you see the screens start here; it would be right about here, on the screens on number 3 machine.

Q. You're indicating a spot opposite and to the east of the screen on the number 4 machine?

A. Yes.

Q. And the screen on the number 4 machine is shown in plaintiff's Exhibit 1 in the lower right hand corner?

A. Well, the screens aren't on here. The screens are about [64] here.

Q. I see. How long have you been with the paper company, by the way?

A. It was 1913 or '14. I was under the impression it was 1913, in the spring.

Q. And had you worked on the number 4 machine yourself?      A. Yes, I have.

Q. Have you served as back tender of the number 4 machine?      A. That's right.

Q. Just briefly, what are the duties of a back tender on the number 4 machine?

A. Well, the back tender does the drying of the paper, and putting the finish on, the calendering of it; has charge of the winding, and when the paper

(Testimony of George Leitner.)

is being brought over from the wet end to the dry end, the back tender does the manual part of bringing it over the machine.

Q. He takes it over the top by hand?

A. He brings it to the rope; of course the ropes take it over, and at the same time the back tender is an understudy to the machine tender. He's always trying to get information, and that's what he's looking forward to.

Q. As the back tender of that number 4 machine you're familiar with its operation? A. Yes.

Q. At the day of the accident, July 3, 1946, did you notice [65] the number 4 machine speed up?

A. Well, at the time of the accident, yes.

Q. What did you notice? What did you observe?

A. Well, you notice the speed; you'd hear the sound; you heard the sound; first you could hear the speeding up, and you could see the speeding up.

Q. Does it have a characteristic sound when it is running at its regular speed?

A. Oh, yes, it has its particular certain drone when its running normally.

Q. And all of a sudden did it have a different sound? A. Very much different.

Q. And what would you say with reference to whether or no the speed increased suddenly or not?

A. Oh, yes.

Q. And what about the noise of the increase in speed?

A. Well, just in a tempo; you have a steady drone, it's a monotonous drone, there's no differ-

(Testimony of George Leitner.)

ence, everything running steady, there's no foreign noises; there's that one drone. When they speed up everything changes.

Q. The noise is louder?

A. Well, I couldn't say the loudness. It's a different tempo, the speed going up, really going up.

Q. Well, at that time did the machine appear to run faster than you had ever seen it run before?

A. Oh, yes.

Q. And are you the same individual referred to by the witness Janosky as going for the safety handle?

A. That's right.

Q. Did you hear this sudden unusual noise that you referred to before you pulled the cord?

A. That's why I pulled it; I heard that noise.

Q. Did you pull the safety chain?

A. I did.

Q. Is that the handle as shown on plaintiff's Exhibit 9; is that the handle you pulled?

A. That's it.

Mr. Kelley: You may inquire.

#### Cross-Examination

By Mr. Paine:

Q. The noise that you were speaking of that you heard before you pulled this safety chain was the increased noise of the speeding machine?

A. The whole machine you could hear speed up.

Q. That speed-up, like any railroad train or anything else, when it speeds it gives a different tempo to the noise?

(Testimony of George Leitner.)

A. It would be just like driving a car at 5 miles an hour, and you step it up to 40, only it's not gradual; it's right now.

Q. It was fairly sudden, then? How far did you travel to this safety stop? [67]

A. Oh, I'd just say offhand probably 60 feet.

Q. And you and Janosky arrived there practically simultaneously, you think?

A. Well, I just heard Ralph say yes, but things happened, and I just run over and pulled it, and I didn't pay a bit of attention to who was around at all.

Q. And you don't whether Janosky was standing right beside you or not?

A. I didn't pay that much attention. We were having a little difficulty with our machine. I was just going to pull that safety valve and get back to my job.

Q. And it's a chain that goes through the pipe?

A. Yes.

Q. That came up readily as you pulled it, a foot and a half in the air?

A. Well, it pulled up readily, and then whenever it worked you could feel something drag, like it should.

Q. And you felt it operate as it should operate?

A. It felt to me like it should have been operating correctly.

Q. That is, that pin that's in it down below comes out?



(Testimony of George Leitner.)

A. Well, you can't see that from upstairs, but it felt like that might be happening.

Q. You know that's what the arrangement is?

A. That's right; it felt like that's what was going in to [68] happen.

Q. After you pulled that pin out——

Mr. Kelley: He hasn't testified he pulled the pin out.

Q. All right, after you pulled this safety handle that you pulled, did you hear Janosky go blow the engineer's whistle?

A. Well, to be frank about it, things were happening so quick, if you ask me what anybody else was doing but myself I couldn't answer you.

Q. After you pulled on the handle did you hear then the noise of flying or breaking objects, or knocking noises as though things were breaking up down below?

A. Well, it was a little while after; it was pretty quick though.

Q. But there was a lapse of time after you pulled on this before you heard the breaking noises?

A. Yes, there was a little time, because I was getting back already.

Q. Where did you go?

A. I went back to the screens area where I was working; at least I went with that intention of getting back there.

Q. By the time you had gotten back there were things popping pretty badly?

A. Oh, yes, the machine was flying around pretty good then. [69]

(Testimony of George Leitner.)

Q. Was the machine speeded up even more after you pulled on this chain, than before?

A. I think it did; oh, yes, it did.

Q. Increased its speed? A. Uh huh.

Mr. Paine: That's all.

(Whereupon, there being no further questions, the witness was excused.)

DELBERT W. GIBSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kelley:

Q. Your name is Delbert W. Gibson?

A. That's right.

Q. And you were the back tender on the number 3 machine on or about July 3, 1946?

A. I was, yes.

Q. At the paper mill, and that's right across from the number 4 machine, as shown in plaintiff's Exhibit 1 there? A. Yes.

Q. That end picture on the easel.

A. Yes, right across.

Q. Where were you at the time of the accident?

A. Standing right just opposite here, over on my own machine.

Q. Across from the couch? [70]

A. From the couch roll, yes.

The Court: Perhaps the record should show what exhibit he pointed to then.

Mr. Kelley: Number 1.

The Court: All right.

(Testimony of Delbert W. Gibson)

Q. (By Mr. Kelley): And how did you first notice something was wrong?

A. Well, I had my back to the machine when it happened.

Q. What machine?

A. To the number 4 machine. I was working on my own job, and I heard an unusual sound, and I glanced around.

Q. What did the sound come from?

A. Well, it sounded to me like just a—you know, take off of the machine, that's the way it sounded to me.

Q. A speeding up of the number 4 machine?

A. That's right.

Q. And was that speed faster than you had ever observed the number 4 machine going, making paper?

A. It was, yes.

Q. And what did you do then?

A. Well, I hollered, and started running for this throw-out, and I see I was beat in going to that, so I turned and tried to give assistance then, and everything I went to everybody else was ahead of me, so I just stayed pat there for a little while. [71]

Q. Was there any other indication of an excessive overspeed of the number 4 machine other than the noise?

A. Well, that rubber roll over the couch roll was throwing stock off the wire. That's the first process of the paper when it comes on the machine.

Q. Well, directing your attention to plaintiff's Exhibit 1 and 5, could you indicate to the Court what you mean by stock jumping off the couch?

(Testimony of Delbert W. Gibson)

A. Well, there's a rubber roll there, and the stock, the speeding up of the machine so sudden, this stock would get lighter on this wire, and then it throws it in the air; it was throwing it up I'd say three or four feet.

Q. What do you call the stock; what is the stock? A. Well, that's the pulp; paper.

Q. Pulp paper? A. Yes.

Q. And had you ever seen that couch roll going that fast before? A. No, I had never.

Q. You had never seen it? A. No.

Mr. Kelley: You may inquire.

#### Cross-Examination

By Mr. Paine:

Q. The stock at that point is rather wet and mushy, isn't it? [72]

A. That's right.

Q. And the faster this goes the thinner the stock gets, is that right? A. Yes, it does.

Q. And these particles of pulp or wet stock were being kicked up in the air?

A. That's right.

Q. Now, you first started to run down to the safety pull stop? A. Yes.

Q. And you saw that somebody had gotten there ahead of you? A. That's right.

Q. And where did you go then?

A. I started back for the wire drive, the clutch of the wire, and by that time, just as I got there, she blowed up; everything started flying, and I thought it was a good time to leave.

(Testimony of Delbert W. Gibson)

Q. So you started down, and somebody was at the stop, then you turned, came back up by the wire—what do you call the wire?

A. The wire drier.

Mr. Kelley: What direction is that?

A. North from the safety pull.

Q. The machine was still increasing in speed?

A. Yes, it was. [73]

Q. And when you got back up there then you heard the noise of breaking parts down below, and some things were beginning to break upstairs?

A. Well, yes; I think it started flying a little upstairs first. Everything was a matter of seconds.

Q. So you got out?

A. I got out as fast as I could.

Mr. Paine: That's all.

(Whereupon, there being no further questions, the witness was excused.)

### EZRA E. COY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Kelley:

Q. Your name is E. E. Coy?

A. E. E. Coy, yes, sir.

Q. And you're stationary engineer at the paper mill?

A. Yes, sir.

Q. And did you have that job on or about July 3, 1946?

A. I did.



(Testimony of Ezra E. Coy.)

Q. By the way, how long have you been with the paper mill?

A. I think it's the 28th of last month was 19 years.

Q. What are, briefly, the duties of the stationary engineer?

A. Well, it's just the duties of any engineer; it's oiling and looking after the engines.

Q. Including this Sumner steam engine in the basement? [74]

A. Yes.

Q. That runs the number 4 paper machine?

A. That's right.

Q. Where were you when you first heard the noise of this engine on or about July 3, 1946?

A. I was over at the opposite side of the basement, on the number 2 side, in the southeast corner, near the light engine.

Mr. Paine: Near what?

A. Near the light engine; that's a DC light engine; that's an emergency light they have there, an auxiliary.

Q. Well, what did you do then?

A. When I first heard the noise I thought it was the stack of the number 2 engine. Paper breaking sometimes makes a noise. It was pretty well over my head, just like a position like this from where I was, and I hesitated, probably a couple of seconds only, and then I could tell it was on the other side, and I ran back over to the—I'd just come from that side and I ran back over to that side.

(Testimony of Ezra E. Coy.)

Q. What side is that, for the record?

A. From the east to the west side, over toward number 4 engine, 3 and 4 engines, and I got around in sight of the engine; I had traveled, when I got to the place where I first got in sight of the engine, I traveled about 20 [75] feet toward the engine, and at that time the shafting began to fly, and I didn't go any further.

Q. Were you able to see the flywheel of the Sumner steam engine at all?      A. Yes, I did.

Q. And what was its speed?

A. Well, it was so high that it was hard to tell, but it seemed to me that it was at least three or four times as fast as it was running, the running speed at that time.

Q. By the running speed do you mean the normal paper making speed?

A. Well, that was at the speed it was running at that time, something over 300 feet.

Q. And what did you do after the machinery started breaking up?

A. I hesitated just a moment, wondering whether I should go down and try to do something about the engine, but the steam and water was flying there, and I thought the only thing to do then was to go back around to the head valve which is on the east side of the machine, or east side of those two engines, over under number 2 machine, and on the catwalk over number 2 engine, shut off that steam line that runs to number 4.

(Testimony of Ezra E. Coy.)

Q. In other words, if I follow, you ran over to the east side on a catwalk over the number 2 engine and shut off [76] the main steam line that goes to the number 4 engine?      A. That's right.

Q. This flywheel on the number 4 steam engine, at the time you came around the corner there, that flywheel pulley, I believe you said that was going faster than you had ever seen it go before?

A. Oh, yes, very much faster.

Q. Well, after the break-up of the machinery did you remain on the premises?

A. Yes, I did.

Q. Did you remain in the basement room where the Sumner steam engine is located?

A. Yes, I did; I come back directly from shutting off the valve to that side.

Q. After you shut off the valve did you go down in the vicinity of the Sumner engine?

A. I did.

Q. Did you observe the governor belt of the Pickering governor after the accident?

A. Yes, I did.

Q. And where was it?

A. It was down under the governor, on the floor, some of it hanging over the frame of the machine, but underneath the governor.

Q. And under what engine was it? [77]

A. Number 4.

Q. And did you pick up the belt?

A. Yes, I did; I picked up the belt.

(Testimony of Ezra E. Coy.)

Q. Are you the individual who first picked up the belt?      A. Yes, I am.

Q. And did you examine it as to its break?

A. Yes, I did.

Q. What was the nature of that break?

A. It was near the metal splicing, and it was a clean break. It was what I'd call, if you understand what I mean, it was a clean break. There was nothing seemingly to cause it, except that it just simply come apart.

Q. Was there any evidence at all it had been damaged by a blow or a cut?

A. Not anything.

Q. Do you have that belt?      A. No.

Q. Do you know who has it?

A. No, I don't.

Mr. Kelley: You may inquire.

#### Cross-Examination

By Mr. Paine:

Q. What are your duties there, Mr. Coy?

A. Engineer.

Q. What time are you on duty, or were you at that time?

A. At that time I was on the day shift, 7 to 3.

Q. 7 until 3?      A. Yes.

Q. And this happened on your shift?

A. It happened on my shift, yes, sir.

Q. And you were on the opposite side of the basement when you first heard the noise?

A. That's right.

(Testimony of Ezra E. Coy.)

Q. And you went back, I understand, and got within about 20 feet of the number 4 engine?

A. No, that's not right. When I got within—when I first got to the point where I could see number 4 engine I traveled about 20 feet before I stopped.

Q. I didn't want to confuse you; I misunderstood you. After you got to where you could get a view of the number 4 engine you traveled about 20 feet before you stopped?

A. Yes, that's right.

Q. And about how far away from the number 4 engine were you then?

A. Well, not over 45 or 50 feet.

Q. About 45 or 50 feet away from the engine?

A. It's possibly 60, but that would be the most.

Q. Well, was it from that point that you were observing the speed of the flywheel on the engine?

A. That's right.

Q. About 60 feet away? [79]

A. I'd rather say—I'll put it at 50 feet. I believe that's nearer right.

Q. From a distance of about 50 feet you made the observation of the speed of the flywheel, which you thought was going about three or four times faster than it had been prior to this occurrence.

A. Yes, sir.

Q. That's just an estimate on your part, of course?

A. That distance is just an estimate, yes.



(Testimony of Ezra E. Coy.)

Q. Well, and the speed was just an estimate?

A. Yes, it was. I had no way of measuring it, but I'm pretty familiar with the speeds we have, so I don't think there's any doubt about it.

Q. Well, how many revolutions per minute do you think the engine was going then?

A. I would say at least eight or nine hundred; eight hundred at the least.

Q. About eight or nine hundred. A. Yes.

Mr. Kelley: Do you mean revolutions per minute, Mr. Paine?

Q. In RPM's? A. Yes, I'd say so.

Q. Well, now, there's an automatic stop device on that flywheel, isn't there? [80] A. Yes.

Q. And that stops it at 250, doesn't it?

A. 250 revolutions per minute?

Q. Uh huh.

Mr. Kelley: Now, if your Honor please——

A. I don't know for sure.

Mr. Kelley: ——this is improper cross-examination with this witness.

Mr. Paine: Well, he's the engineer in charge there in the basement, and is testifying as to the speed of this engine.

The Court: I'll overrule the objection. He can testify if he knows. If he doesn't he can say so.

A. I don't know; I couldn't answer that question; at that special time I couldn't tell you.

Q. (By Mr. Paine): What?

A. At that time I couldn't tell you what this automatic would stop it at.

(Testimony of Ezra E. Coy.)

Q. You're the engineer in charge of that engine, aren't you?      A. Yes.

Mr. Kelley: I object to that, if your Honor please; he's arguing with the witness.

Q. I just want to find out; are you the engineer in charge of that engine?

The Court: Are, or was? [81]

A. I was at the time, yes.

Q. The engineer in charge of the engine?

A. Yes.

Q. You know it is equipped with an automatic device on the flywheel?      A. Yes.

Q. And do you know what that's adjusted to operate at?

A. I didn't, not at the time; I don't know just what it was adjusted at, no, sir.

Q. Well, do you mean just at that moment, or what do you mean; just not at the time?

Mr. Kelley: I'll have to object to this, if your Honor please. The witness said he didn't know.

A. The fact is——

The Court: Well, wait a minute. I'll overrule the objection. You're inquiring now as to what time he means.

A. No, I don't know what time it was, or what speed it was going, what revolutions per minute it was that it would trip at; I couldn't tell you.

Q. Well, had you ever tested the device, or set it?

A. Yes, sir; we hadn't set it, but we had tested the device. I hadn't helped to set it, but I helped to test it.

(Testimony of Ezra E. Coy.)

Q. And at what speeds was it tested? [82]

A. I don't know.

Q. You don't know that? A. No.

Q. Do you know what the purpose of that device on the wheel was?

A. Yes, the purpose is to shut off the steam in the engine.

Q. When the engine began to overspeed?

A. That's right.

Q. And how much overspeed was the engine supposed to get before the device would shut it off?

Mr. Kelley: Object to this as not proper cross-examination, if the Court please.

The Court: I think he said he didn't know. I'll overrule the objection.

Mr. Kelley: To expedite matters, your Honor, your Honor permitted the interruption of the testimony of Mr. Black, to some extent on this, to permit the testimony of the witnesses as to the increase in speed of the number 4 engine, for which purpose they are primarily called.

The Court: Well, I understand that. I'll overrule the objection.

Mr. Paine: Would you read the last question?

(Whereupon, the reporter read the last previous question.) [83]

Mr. Kelley: He's already answered, if your Honor please, several times that he didn't know.

The Court: I'll overrule the objection. He can say it again.

A. (Witness): Now, what is it you want next?

The Court: Read the question.

(Testimony of Ezra E. Coy.)

(Whereupon, the reporter again read the last previous question.)

A. (Witness): How much overspeed supposed to get before the device would shut it off?

Mr. Kelley: Do you understand the question?

A. Yes, it's practically the same question.

Mr. Kelley: Well, I thought so too.

Mr. Paine: Let the witness answer without Mr. Kelley's interjecting here.

A. I don't know exactly, so I couldn't answer it.

Q. (By Mr. Paine): Could you give us approximately? I don't want it down to one revolution a minute, Mr. Coy.

A. Well, it's supposed to shut off at less than 300; that's the best answer I could give you.

Q. That's entirely satisfactory; and it was going, as you estimated it, at about 800; that's what you said, wasn't it?

A. Yes, that's what I said.

Q. Now, you then decided—was Mr. Janecek there at the [84] time?

A. He came down after the break, yes.

Q. He came down after the break, and before you left to shut off the steam valve?

A. Oh, no, not before I left to shut off the steam valve. I didn't see him until after I shut off the steam valve.

Q. You're sure about that? You didn't have any conversation with him before you shut off the steam valve?

(Testimony of Ezra E. Coy.)

Mr. Kelley: I object to this, you Honor. This is certainly improper cross-examination.

The Court: Who is that?

Mr. Paine: The superintendent, who is going to be a witness.

The Court: I'll overrule the objection.

Q. (By Mr. Paine): When did you first see Mr. Janecek down there?

A. Oh, it was just a few minutes, probably not over five minutes, right soon after I got back over to number 4 engine; after I shut off the steam valve, Mr. Janecek was there. That's only a few minutes, only four or five minutes.

Q. But you don't think you saw him before you shut off the steam valve?

A. No, I had no conversation with him before that.

Q. Now, it's quite a ways to the steam valve, isn't it? You [85] go up through a catwalk and around to the other side of the building?

A. From where I started, after I stopped, from where I saw the engine speed, I should say it's around 175 feet, 150 feet, around to the other engine, and then there's only a few steps to where I shut the valve.

Q. Well, the noise had pretty well subsided, the noise of the breaking parts, by the time you got to the valve?

A. Well, far as I know, outside of the steam, yes, the noise had stopped.



(Testimony of Ezra E. Coy.)

Q. By the time you got to the valve there was still some noise of the escaping steam, but all the noise of the breaking parts had stopped?

A. Yes, as far as I know; I couldn't be sure of that, though; I mustn't answer that directly, because I went around to the other side; I couldn't hear it so well.

Q. You're a little deaf, too, are you?

A. A little bit.

Q. Anyway, you didn't hear it, is that right?

A. I didn't hear anything but the steam escaping when I got around to the valve.

(Whereupon, a short piece of belting was marked defendant's Exhibit No. 12 for identification.)

Q. I show you what's been marked for identification as [86] defendant's Exhibit 12, Mr. Coy, and ask you if that looks like the piece of belting that was broken when you last saw it?

A. Yes, that looks something like it.

Q. It was that type of belting or that type of fastening?

A. It was that type of belting and that type of fastening, yes, sir.

Q. You wouldn't want to say for sure that it was or wasn't, I presume, but it does look like it?

A. It looks like it, yes.

Q. And does the break in it look like the break that you last saw?

A. Very much like it, yes.

Mr. Paine: I think that's all. I'll identify it later.

The Court: Yes.

Mr. Kelley: Are you offering it?

Mr. Paine: No, I'm not offering it at this time, Mr. Kelley. That's all.

The Court: Are you through with this witness?

Mr. Paine: Yes, your Honor.

(Whereupon, there being no further questions, the witness was excused.)

### RICHARD C. DAVIS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [87]

#### Direct Examination

By Mr. Kelley:

Q. Your name is Richard C. Davis?

A. Right.

Q. Were you the machine tender on the number 4 paper machine in the Inland Empire Paper Company at the time of the accident we're talking about, July 3, 1946? A. I was.

Q. By the way, how long have you been a machine tender?

A. At this time it's four or five years.

Q. What occupation have you followed in your adult life?

A. Well, I've followed paper making the biggest part of my life.

(Testimony of Richard C. Davis.)

Q. How long have you worked around paper mills?

A. In the neighborhood of 30, 32 years.

Q. Directing your attention to the afternoon of July 3, 1946, whereabouts were you when the accident occurred?

A. I was across the aisle, between number 3 and number 4 machines, and between the bird screens on the number 3 machine.

Q. I wonder if you could indicate to the Court briefly with the use of a pointer, directing your attention to plaintiff's Exhibit 1, whereabouts you were, if that shows enough space?

A. Number 4 bird screens are sitting ahead of the paper machine, and number 3 are across the aisle from it. [88]

Q. Is there another exhibit there that shows the position that you refer to on the number 4 machine better?

A. No, there isn't.

Q. How about Exhibit 5, press rolls of the first press?

A. Well, it does show the bird screens in this picture, and it's across to the east.

Q. I see. You may take the chair. How did you first notice anything unusual?

A. Well, someone had whistled, and whistling is a means of attracting other people's attention when there is something wrong.

Q. Was the number 4 machine—was or was not the number 4 machine running away at that time?

A. Well, it must have been, because—

(Testimony of Richard C. Davis.)

Mr. Paine: I'll object to that.

The Court: I think that might be objectionable. You can ask him what he observed, and what was happening there.

Q. (Mr. Kelley): What did you observe with reference to the speed of the number 4 machine at that time?

A. At the time I turned around I noticed the stock was being thrown by the breaker roll on number 4 couch.

Q. And what with respect to the wire of the number 4 machine?

A. And it appeared to be going at an unusual rate of speed. [89]

Q. Can you show us on plaintiff's Exhibit 4, I believe, with the use of that exhibit, what you observed there, and explain to the Court in your own words?

A. It would be number 1, wouldn't it?

Q. Yes, Plaintiff's Exhibit 1.

A. We have a rubber breaker roll riding on top of the couch, and the stock running down the wire was being thrown in the air by this rubber roll.

Q. How high was that pulp being thrown?

A. Well, from the angle in which I was standing, or located, it looked to be three or four feet high.

Q. You mean from the roll itself? A. Yes.

Q. Three or four feet above the roll itself?

A. Yes.

(Testimony of Richard C. Davis.)

Q. By the way, what is your best estimate as to how high that roll, that couch roll, is from the floor?

A. I don't believe it's over three and a half feet.

Q. Well, then, what did you do?

A. I got down off the bird screens and run for the starting lever on the wire.

Q. You mean the starting lever on the clutch of the number 4 machine?

A. The starting lever, yes.

Q. Directing your attention to Exhibit 5, can you indicate [90] where that was?

A. The starting lever?

Q. Yes.

A. This is the starting lever right above the pointer. It is located north of the couch roll, about three feet.

Q. I wonder if you'd just take a pen and mark "D" at that point on that exhibit, Exhibit 5?

A. Just below?

Q. Make a "D" at the point where the starting lever on the clutch is there.

A. It isn't very plain.

Q. You may have the chair, Mr. Davis. You are familiar with the paper speed of that number 4 machine at the time of the accident?

A. Yes, I am.

Q. And what was that paper speed?

A. 346.

Q. Will you explain to the Court what you mean by 346?

A. That 346 linear feet per minute. That is the rate of the paper when it is finished.



(Testimony of Richard C. Davis.)

Q. That was the speed that that number 4 machine was set to operate for this grade paper?

A. That's right.

Q. And how fast would you say the wire of the number 4 machine was traveling before that machinery broke? [91]

A. Well, it would be my estimate that it would be in the neighborhood of 2000 feet.

Q. That, as far as you're concerned, is just a guess, though?

A. Yes, it's just a guess.

Q. In any event, with respect to the speed of that number 4 machine, was it going faster than you had ever saw it go before, making paper?

A. Yes, it is.

Q. Did you observe any pulleys going in the air from the number 4 machine at that time?

A. Well, it is fairly hard to estimate what all a person does see in a spot of that kind. A person sees lots of things.

Q. Well, do you recall seeing any pulley?

A. No, I can't say that I ever saw parts of pulleys, although it might have been.

Q. Do you recall ever seeing the wire pulley going?

A. No, I can't say that I did.

Q. But you saw this pulp in the air?

A. Yes.

Q. You know that some of the pulleys exploded, but you don't know which ones, is that it?

A. That's right.

Q. And you don't know which exploded first?

A. No.

(Testimony of Richard C. Davis.)

Q. Well, why did you throw the clutch out?

A. Well, it's just instinct, I think, when a person's in trouble, to try to stop and save some of the machinery.

Q. You wanted to save the wire from excessive speed?

A. From damage, if possible.

Q. From damaging what?

A. From damage.

Mr. Kelley: You may inquire.

### Cross-Examination

By Mr. Paine:

Q. This whistle you heard, was that somebody whistling, or was it the engineer's whistle?

A. No, it was one of the workers had whistled.

Q. Did you hear the engineer whistle being blown?

A. No, I didn't.

Q. You have no recollection of that?

A. No, sir.

Q. And this 2000 feet a minute is just as Mr. Kelley says, a guess on your part?

A. That is absolutely all.

Q. You don't know what effect such speed would have on the machinery, or anything of that sort?

A. No, I don't.

Q. And there was no damage to the number 4 machine itself, the paper machine? [93]

A. Sir?

Q. There was no damage to the paper machine itself; the damage was all to the line shaft and pulleys, wasn't it?

A. No, there was clothing losses on the machine.

(Testimony of Richard C. Davis.)

Q. There was what?

A. The clothing on the machine was damaged.

Q. Clothing?

A. Yes, we call the wires and the felt the clothing of the machine.

Q. And when you pulled this clutch had things begun to pop downstairs at that time, or did that start right afterwards?

A. Well, I wouldn't guess on that, either. I don't know.

Q. You don't know; and do you know whether the noise increased after the pulling of the clutch?

A. Well, it was all just about the same time, I think, as far as I can recollect.

Q. Did I undertand, did you go out of the room?

A. I didn't leave the room, no. I started out, but it was all over before I got anywheres near the door, so I stopped.

Q. Was the steam still escaping down below?

A. The steam was escaping from the engine, the broken pipes.

Mr. Paine: That's all. [94]

#### Redirect. Examination

By Mr. Kelley:

Q. Normally does that machine speed up or slow down when you throw out that clutch which is designated by point "D" on Exhibit 5?

A. It very seldom does.

Q. By the way, what would be the maximum speed for this wire on the number 4 machine, on any grade of paper?

(Testimony of Richard C. Davis.)

A. I think 700 feet would be plenty high on that, although we used to run normally between 760 and 780.

Q. That was a number of years ago?

A. Yes.

Q. Five, six, seven years ago?

A. All of that.

The Court: I'm not sure that I understand what the witnesses mean when they refer to these clutches. Is that a device for disconnecting part of the machine, or the machine, from the power?

Q. Will you explain what you mean by the clutches?

A. We have independent clutches on each section of the machine, and disengaging these clutches is the same as pushing in the clutch on your automobile; it frees it.

Q. It neither increases or decreases the speed of the engine? No, sir.

The Court: It frees the machinery from the power? [95] A. Yes.

Mr. Kelley: I'm sorry, I didn't catch your question.

The Court: I asked if he meant it freed the machinery from the power, and he said yes.

Mr. Kelley: That's all.

#### Recross-Examination

By Mr. Paine:

Q. When you took the load off, it might cause the engine to speed, not the paper machine?

A. Yes.

(Testimony of Richard C. Davis.)

Q. Just the same as when you take your foot off the clutch of your automobile, the engine might increase a little?

A. It might increase the speed a little, but the governor is supposed to slow that down again.

Q. Disconnecting the clutch would increase the speed of the engine? A. Yes.

Q. And this operation at 760, 780 feet a minute, while you haven't made that type of paper recently, this machine is built to operate at that speed, and has operated satisfactorily at that speed, isn't that so? A. That's right.

Mr. Paine: That's all.

(Whereupon, there being no further questions, the witness was excused.) [96]

### JEROME L. JANECEK,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Kelley:

Q. What is your name, please?

A. Jerome L. Janecek.

Q. And you are the superintendent at the Inland Empire Paper Company? A. Yes, sir.

Q. And you were occupying that position on July 3, 1946, at the time of the accident we're discussing here, is that true? A. Yes.

Q. How long have you been with the paper company? A. Since 1936.



(Testimony of Jerome L. Janeczek.)

Q. How long have you been in the paper mill industry?      A. Since 1908.

Q. Whereabouts were you at the time of this accident?

A. Between number 3 and 4 machine.

Q. At what end?

A. At the very south end, just ready to leave.

Q. Will you take the pointer, and directing your attention to plaintiff's Exhibit 1, show the court where that is again? [97]

A. Number 1?

Q. Yes, that's the first exhibit on the end there.

A. This one?

Q. Yes.      A. 'Way back at that end.

Q. What were you doing at that time?

A. Talking to Mr. Janosky, the back tender.

Q. He was the back tender of what?

A. Number 4 machine.

Q. And what occurred at that time?

A. The paper broke on his machine, at the dry end.

Q. What end is the dry end, the south end?

A. South end.

Q. And what did you do?

A. Well, I motioned to him, because I was facing the machine. He had his back to it. He turned around and left to take care of it.

Q. Which way did he go?

A. Northerly, mostly north, slightly west, to get to his machine.

Q. Toward the wet end?

(Testimony of Jerome L. Janecek.)

A. Well, toward the wet end, but his work was at the dry end at the time.

Q. Well, as you saw him going toward the north end, what did [98] you do?

A. Well, I turned around to leave the room, then I thought I'd take a look and see how he was getting along, or if there was anything wrong, and instead of him threading the paper through the stack the way he should, why, he started to run the other end.

Q. What end is that?

A. That's the wet end.

Q. And then what did he do?

A. I beg your pardon, I didn't get your question.

(Whereupon, the reporter read the last previous question.)

A. What did the back tender do?

Q. Yes.

A. Well, he ran toward the other end.

Q. Did you notice whether he went for the safety chain or not?

A. Well, at the time, I didn't know that he went for the safety chain, no.

Q. Well, what did you do then?

A. Well, I just happened to come from the wet end and I knew that Davis, who's supposed to be running that machine, was assisting over on number 3, and I figured that he probably wouldn't be able to get over there quick enough to take care of whatever was wrong, so I ran down to the [99] other end behind Janosky.

(Testimony of Jerome L. Janacek.)

Q. Well, whereabouts were you at that time with respect, for example, the couch roll of the number 4 paper machine?

A. Well, on the way down to the wet end I didn't know really why I was running. I knew that there was some good reason why he was going down there, and the machine is operated in sections, so as I was running down to the other end I was trying to analyze just what was wrong, why he was in such a hurry to get there, so I ran about until I got about fifty feet from the couch roll when I noticed that the machine was running away.

Q. What machine was that?

A. Number 4.

Q. How was that manifest? What fact showed you that it was running away?

A. The increase in the noise, and somewhat of the change of whine, tone, gears, and the fact that the felts and wire were fluttering and the couch roll was throwing stock into the air.

Q. What do you mean by the felts and wire fluttering?

A. Well, when there's an excessive speed on those felt rolls and the wire reels, why, they begin to whip. The felts and wires are a continuous blanket, or the same as a continuous blanket, and if the rolls are whipped it would cause the felt or wire to flutter. [100]

Q. You say you saw pulp being thrown in the air?

A. Yes, sir.

(Testimony of Jerome L. Janecek.)

Q. Where were you with respect to the couch roll of the number 4 machine when you observed pulp being thrown in the air?

A. Oh, about 45 or 50 feet south of it, in the aisle.

Q. Can you show the Court from any of these exhibits, from Exhibit 6, for example, or 5, can you show the Court where the couch roll is on 5?

A. This is the bottom couch roll right here.

Q. And when you saw the pulp being thrown in the air where were you with respect to that spot?

A. Here's the center of the aisle. I'd say I was over three quarters of the way east from this machine, and this way about 50 feet.

Q. Can you indicate on that picture where you were, or would that allow enough space?

A. Well, in this direction. Here's the first felt. That occupies the space from here to here, and from there further along this same direction is the second felt, and over above it is the third felt. The two felts don't take up much more space there than this one does alone. Well, I was opposite those two felts.

Q. Well, directing your attention, for the record, to these pipes where my pointer is indicating on Exhibit 5, what [101] what are those called?

A. Those are water legs on a suction system.

Q. Now, where with reference to those water legs did you observe pulp being thrown in the air, as you faced the couch roll on the number 4 machine?

A. This is the face of the reel. Back of that is the couch roll, which is the same, parallel to that and about the same face, so as you'll see, this is a

(Testimony of Jerome L. Janecek.)

diagonal picture. Part of the couch roll is sticking out here. The lumps were cast up in here, and crossed this full area here.

Q. About how high were they going?

A. I'd say about four or five feet.

Q. Well, just to fix it for the record, for identification, directing your attention to Exhibit 5, a picture of the press rolls of the first press, and particularly to this piping that runs in a general easterly and westerly direction, how much higher, if higher, was the pulp being thrown with respect to that piping, for example?

A. I should say ten inches above that hand rail. It was above the hand rail.

Q. Do you know how high that hand rail is from the couch roll, for example?

A. I'd say it is four feet. That's four feet above where the paper should normally come out. The paper should come out between the two couch rolls, the top and the [102] bottom. The couch roll is twelve or fourteen inches in diameter.

Q. Did you observe any driven wire pulley damaged?

A. Yes, sir.

Q. Whereabouts?

A. The wire pulley sets under the—on my right here.

Q. You're indicating now the water leg on Exhibit 5?

A. Yes, counting from left to right, or south to north, the wire pulley is nearer the right end of those two water legs, that is, of those several water legs.



(Testimony of Jerome L. Janecek.)

Q. Did that driven wire pulley damage any of those water legs, by the way?

A. It damaged two of them seriously, and some small piping on one, at least one, of those others. That's numbers 1, 2 and 3.

Q. Directing your attention to Exhibit 7, is that a picture of the wire driven pulley you're referring to?

A. Yes, sir.

Q. Did you observe the driven wire pulley that's set forth in plaintiff's Exhibit 7, was that hurled in the air?

A. Yes, sir.

Q. And when did you make that observation, with reference to when you first saw the pulp being thrown above the couch roll?

A. Well, I was running, and just as I realized that it was [103] that the machine was running too fast, and saw this pulp, and saw the reason for it, realized what the reason was, that this pulp was flying in the air was an overspeed, just then the wire, or the first felt pulley went up in the air.

Q. You saw the pulp being hurled in the air before you ever saw the wire pulley go in the air?

A. That's right.

Q. You mentioned this speed. Was that number 4 machine going faster than it ever had gone before, making paper?

A. The fact that the pulp was flying in the air indicated that it was.

Q. What did you do then?

A. I turned for the safety chain, which by that time I had passed, but I found that Janosky and

(Testimony of Jerome L. Janecek.)

Leitner, and it seems to me there was one or two others there already, and I had done that, of course, just as I stopped, I started to do that when this pulley exploded. Well, when these one or two pulleys exploded on the wire or the first press, instantly after that there was another explosion to my left. I thought it was the third press pulley, which should have been just about to my left, but I didn't see anything go up in the air. Later I concluded it must have been the explosion downstairs.

Q. By the way, how do the operators keep check with the [104] speed of the number 4 paper machine when it is running? How do they do that?

A. By counting the revolutions of the drier or the bottom calender roll.

Q. And did you go down to the basement where the Sumner steam engine was located, after the accident?

A. Well, the first thing I did when those two explosions had occurred, why, I was afraid that the engine might come up through the floor, so I started to leave there, and I went toward the dry end again, and by the time I got to the dry end, why, the worst of it was over.

Q. That's the south end of the number 4?

A. That's the south end, where I had originally started from, and by that time the chemist had showed up at that particular place, and I sent him over to the boiler room to have the steam shut off of that side of the mill.

Q. Who was he?

A. A fellow by the name of Lovegrin.

(Testimony of Jerome L. Janecek.)

Q. Where is Lovegrin now?

A. Oh, he's left our employ about eight or ten months ago, and he's someplace in Pennsylvania.

Q. And did you go over to the Sumner steam engine yourself?

A. I went downstairs right after that.

Q. What did you notice with respect to the Pickering Governor of the Sumner steam engine?

A. Well, at first there was a lot of water and steam flying around, and it was quite cloudy, and I couldn't make out anything except parts of the engine through the fog and water, but shortly after that, why, it cleared up, because meanwhile Coy had gone over and had shut the steam off of number 3 and 4 machines, and by that time, why, we got over to the engine, that is, we could see the engine.

Q. You were able to make observations?

A. Yes, and it was running along slowly, just idling.

Q. And what with respect to the Pickering governor? Was that or was that not tripped?

A. Well, the overspeed was tripped.

Q. By the overspeed you mean the Brownell overspeed stop?

A. Yes.

Q. What about the Pickering governor itself?

A. It wasn't tripped.

Q. Did you notice the belt?

A. The belt was broke.

Q. What about the safety chain? Directing your attention to Exhibit 10, a picture showing the chain

(Testimony of Jerome L. Janacek.)

going through the floor to the Summer steam engine, had that safety chain pulled the pin?

A. No, the pin didn't quite pull clear out.

Q. Well, what did you do with respect to that machinery right then, yourself? Did you touch it?

A. Well, I asked Coy to shut it down. He had to shut the throttle off.

Q. By the way, when did an insurance representative get to the scene of the accident?

A. Oh, I can't remember now, but four o'clock would be my guess.

Q. That same day? A. Yes.

Q. By the way, there's been some talk here about the number 4 machine operating speed. What speed was it that day?

A. The speed of that machine?

Q. Yes. A. About 345.

Q. And when was the last time the machine had ever operated at a higher speed?

A. Well, you mean a higher speed, or a maximum speed?

Q. No, a higher speed of making paper; 690 lineal feet, for example.

A. Well, when we ran out of wood about 1941 we had to change our grade, and we went on to waste paper and various war grades, and that put us off of news, and news was the one grade that we run at those speeds.

Q. Well, since 1941 what speed have you been running that number 4 paper machine?

A. From about 75 to 450 feet. [107]

(Testimony of Jerome L. Janecek.)

Q. And most of it under 400 feet?

A. Most of it under 400 feet.

Q. If the Brownell overspeed stop were set at, for example, 700 lineal feet, that wouldn't interfere with the operation of your paper machine?

A. At any speed below that, no.

Q. What is and was the top speed of that number 4 paper machine?

A. I've run it about 680, 690 feet, but there was a time before I came when they ran it on a different——

Q. Well, I'm not talking about before you came. I mean of your own personal knowledge, and you've been there since when?      A. 1936.

Mr. Paine: I don't think he gave the answer. He started to, but I don't think he finished the answer.

The Court: How long had he been there?

Mr. Paine: No, the top speed that it had been run since he had been there.

The Court: I understood him to say 690 feet.

A. 680 or 690 feet.

Q. Did you stop the third and second felts yourself?      A. No.

Mr. Kelley: I think that's all.

#### Cross-Examination

By Mr. Paine:

Mr. Paine: Is this all the testimony you expect to put on by Mr. Janecek, or do you expect to call him after Mr. Black?



(Testimony of Jerome L. Janecek.)

Mr. Kelley: No. I don't know what we'll present in rebuttal.

Q. (Mr. Paine): Now, you were upstairs talking to Mr. Janosky when things began to happen, is that right? A. Yes, sir.

Q. And you turned to go out, and he started up to this safety trip device that works on the butterfly valve?

A. He really started to re-thread the machine.

Q. To what?

A. He really started to re-thread the paper through the machine.

Q. Yes, then you saw him turn and start running up alongside the machine?

A. That's right.

Q. And you wondered what he was running up there for, and by that time the noise began to increase, did it?

A. I hadn't noticed it, because I was expecting something entirely different; the paper could break on the other end, those felts running off, or various reasons, and that's what I was afraid of, that maybe a felt was running off.

Q. And then what finally caused you to start going up to [109] the other end?

A. What prompted me to go to the other end?

Q. Yes.

A. The fact that he was going down there in such a hurry, and Davis wasn't over there to help him; I didn't think Davis might get over there, could get over there, as fast as I could.

(Testimony of Jerome L. Janecek.)

Q. And by the time you got up to where the safety stop device was, you say there were men already there?

A. Well, I passed that, because I didn't look to see why Janosky turned. I went straight ahead.

Q. And then you did turn and see that he was down at the safety valve? A. That's right.

Q. And what happened after that? Was that when this first explosion took place?

A. That's right.

Q. And then you heard another following that, on your left?

A. Immediately after the first one.

Q. And you thought maybe the engine was going to blow up, or something?

A. I expected that to be next.

Q. And you turned then and went to the end of the room, to get out?

A. The south end, where I'd come from. [110]

Q. And when you got down towards that end, the commotion was dying down?

A. The noise and—well, everything seemed to be quite quiet, except the steam and water downstairs was making some noise.

Q. Where was it that you met Mr. Lovegrin?

A. At the dry end.

Q. The dry end?

A. That's almost at the end of the building.

Q. And you told him to go up and shut off the main steam throttle?

A. I told him to go to the boiler room and have them shut it off.

(Testimony of Jerome L. Jancek.)

Q. And then you went on down into the basement?  
A. That's right.

Q. And at that time the engine was idling down there, is that right?

A. I couldn't tell immediately for fog and steam, for fog and water, steam and water.

Q. Steam and water well, as soon as the steam and water cleared up, the engine was idling then?

A. That's right.

Q. And then after that it stopped completely, when Coy shut off the steam, is that right?

A. Yes. [111]

Q. About how long was that after you had gotten down into the basement?

A. Oh, I perhaps was down there five minutes. Coy wasn't there when I got there. He had already turned around, apparently, and went to shut the steam off.

Q. Well, but you could tell the effect of his shutting the throttle stopped the machine from idling?

A. The steam cleared up very shortly after it was shut off, yes.

Q. And that was after you were down in the basement, and the commotion ceased, and the engine had gone back to an idling pace, is that right?

A. That's right.

Q. Then when the steam cleared away and you surveyed the damage down there, a lot of this line shaft and pulleys were broken, were they?

A. Yes, sir.

(Testimony of Jerome L. Janecek.)

Q. And thrown around rather promiscuously?

A. Yes.

Q. Did you observe any broken pieces of pulleys and equipment near the engine?

A. Not right at the engine. Everything was west of it.

Q. All sort of west of the engine, is that right?

A. West of the engine, where the line shaft was.

Q. And what about this main drive belt from the engine to [112] the line shaft; did it come off when the driven pulley broke?

A. It was lying on the floor.

Q. Was it near the engine?

A. It was still around the engine pulley.

Q. Maybe you could step down here and show me about where that—if we've got a picture that shows that.

A. That belt——

Mr. Kelley: Three and four shows the belt.

Q. Had this pulley broken in the left hand corner, or did the belt come off that?

A. No, that's the one on the engine. The belt stayed on that pulley, in that neighborhood. It couldn't get very far.

Q. This pulley or wheel here is on the engine?

A. Just a minute, I want to get my bearings here.

Mr. Kelley: Take your time. That's the main belt there.

A. That's the line shaft pulley, the driven pulley.

Q. Yes?           A. Yes.

Q. And that had broken?           A. Yes.

(Testimony of Jerome L. Janecek.)

Q. And the belt had flown back towards the engine, and was curled up under the engine, near the engine? [113]

A. Well, there isn't much room for that belt. It's a large belt, but it had come this way and was lying still in the general direction that it should be driving, but it was laying on the floor.

Mr. Kelley: Are you indicating a general north-east direction?

A. General west; I wouldn't say whether it was east or—yes—I thought you said north—I misunderstood the question. General northeast. This way is south.

Q. This way is south?

A. Yes. That way is west.

Q. Was it over this, looks like a little wall there, on top, on this, wasn't it?

A. It was perhaps all the way out of that wall, or anyway it had moved from here in here some place.

Q. Was it jammed up in any way in connection with the engine itself, or any moving parts of the engine?

A. I couldn't see where it was, except that on the engine there isn't very much room to spare, that is, on the pulley of the engine; it couldn't very well get out of there.

Q. What was its condition? Was it torn or broken in any respect? A. It was bruised.

Q. Was there a tear in it? [114]

A. Some small gouges, as far as I can remember. It didn't need any repairs.



(Testimony of Jerome L. Janecek.)

Q. You don't remember a strip torn in it?

A. Well, if you'd call a gash anywheres from two to six inches a strip, I'd say yes, but it wasn't tore out; it was gashed or bruised. A broken pulley or a shaft might have hit it.

Q. And where had the pieces of this pulley gone; had they flown over in the general direction of the engine?

A. There were pulley pieces all over the basement, from all the pulleys that were broke, and I couldn't tell you which was which.

Q. The basement was pretty well covered with them?      A. Yes, sir.

Q. Now, you went over to the number 4 engine, you said, I think, and noticed that the belt to the governor was broken and off?      A. Yes, sir.

Q. Where was it lying?

A. About as directly under it as it could fall. It didn't throw itself or fly out of position at all. It broke and fell straight down.

Q. It broke and had fallen down fairly straight underneath the machine?      A. Yes, sir. [115]

Q. And I don't believe you at that time examined the machine further with any care, did you, Mr. Janecek?      A. You mean the engine?

Q. The engine.

A. Well, I wanted to know why some of these safeties on it didn't work. That was the first thing I was interested in.

Q. And you examined the Brownell stop?

A. Yes, sir.

(Testimony of Jerome L. Janecek.)

Q. It had worked? A. It had.

Q. Now, did you say you examined the stop on the governor?

A. You mean the safety stops? Yes, sir.

Q. Huh? A. Yes.

Q. When did you do that?

A. At the same time.

Q. What sort of an examination did you make of that?

A. Well, I wanted to see if the pin had dropped.

Q. You mean this pin, now, that goes up to the safety pull upstairs? A. Yes, that's right.

Mr. Kelley: Are you talking now about the Pickering governor or the butterfly valve?

A. Butterfly valve, I am. [116]

Q. Yes, sir; and the pin had been pulled from the link in the butterfly valve?

A. It's the safety pin that they pulled upsairs. The handle is upstairs.

Q. The handle is upstairs; it hangs down on a chain and lifts the pin out.

Mr. Kelley: You may take the chair, Mr. Janecek.

The Court: It's time for adjournment now. We might as well suspend.

(Whereupon, the Court took a recess in this cause until October 8, 1947, at 10 o'clock a.m.)

Spokane, Washington  
Wednesday, October 8, 1947  
10 o'Clock A.M.

JEROME L. JANECEK

Cross-Examination

(Continued)

By Mr. Paine:

Q. You might just step down here. On Exhibit 8—just stand around on this side so that the Court can see—this pin we have reference to is this little pin here in the upper right hand corner of the exhibit number 8, attached to a chain that leads up to the top of the picture, is that right?

A. Yes.

Q. And this chain then runs on up through and comes up through the pipe on exhibit 10, the chain itself, on up through the floor and comes out here, through the pipe to a handle in exhibit 9?

A. Yes. [117]

Q. That's right; and that chain is fairly taut; it isn't looped or slacked, it just runs from here right straight up through, doesn't it?

A. There could be some slack in it.

Q. Very much?

A. No, but there might be an inch or two.

Q. Now, when you took a look at this, what condition did you find the pin in?

Mr. Kelley: Just a minute; by "this"—

Q. The pin on Exhibit 8.

A. The pin was pulled clear up to the lower leg.

(Testimony of Jerome L. Janecek.)

Q. Clear up to the lower leg?

A. There's two legs there, two loops, or two eyes.

Q. And it was pulled up to the lower of those two eyes?

A. Yes, sir.

Q. It wasn't pulled out of the eyes, then, was it?

A. No.

Q. And in order to release the butterfly valve, it has to be pulled out of the eyes, doesn't it?

A. Yes.

Q. So that the pulling of the safety handle upstairs had failed to operate to release the butterfly valve downstairs, hadn't it?

A. That's right.

The Court: I wonder if there is any question about the effect of pulling that pin out from the butterfly valve? Does that shut the steam off from the engine?

Mr. Paine: Yes——

Mr. Kelley: I wonder if the witness could answer that?

Mr. Paine: Yes, I'm not going to answer it.

The Court: What I had in mind was, if counsel could agree on it, they could tell me.

Q. (By Mr. Paine): Would you explain that, Mr. Janecek, a little more in detail, what this butterfly valve mechanism, how it operates to stop the engine?

A. It works the same as a damper in a stove pipe. A half turn, it would be crosswise in the pipe, or back, it would allow steam to flow through

(Testimony of Jerome L. Janecek.)

very freely, practically open. In other words, it would be edgewise, and across the pipe as an obstruction in another position.

Q. In other words, you have your steam pipe, which is round? A. Right.

Q. And this valve runs through so that when it is open it is merely a plane surface, and the steam comes through? A. That's right.

Q. And when the valve is closed, it swings around in some fashion such as that, and shuts off the steam, is that right? [119] A. Yes.

Q. Now, on this device we were talking about here, you might step down here again, in Exhibit 8, where the pin was, over right on the center of the picture to the right is a square or oblong looking piece of metal. What is that?

A. That's the weight.

Q. And that works as a lever on the arm into this little round piece about an inch away from it here, is that right? A. Yes, sir.

Q. And when that weight comes down, that turns the butterfly valve to a position to shut it off against the flow of the steam? A. That's right.

Q. And by the pulling of the pin, that releases the tension on it so that the weight can drop down and close the butterfly valve, is that right?

A. Yes.

Q. And with the pin in position that holds it there, the weight can't drop down and close the valve, is that right? A. Yes.



(Testimony of Jerome L. Janacek.)

Q. Now, did you look at any other devices there, or was that all you looked at to see whether they had operated or not? [120]

A. There is another stop there that should trip when the belt on the governor breaks, when one of the belts on the governor breaks, and then there's the overspeed device to stop when the machine or engine reaches a pre-determined setting.

Q. That's down on the flywheel, or something, isn't it?

A. The overspeed is on the flywheel.

Q. That works up to the same butterfly valve, doesn't it?      A. Yes, sir.

Q. It comes up and joins the chain here on Exhibit 8 where the pin is located, is that right?

A. This chain.

Q. And they both attach to the same upper arm of the butterfly valve?      A. That's right.

Q. Now, does that release the tension there on the butterfly valve too, or not?

A. In the same way; that is, the chain happens to go slack in the one case, and in the other case it's disconnected by pulling the pin.

Q. Now, what about your examination of any other devices there? Did you make anything other than just a casual look? Did you make an examination of this device on the governor belt?

A. Nothing more than to see if they had tripped or not. [121]

Q. You did examine them to see if they had tripped or not?      A. Yes, sir.

(Testimony of Jerome L. Janecek.)

Q. You feel positive about that? A. Yes.

Q. What did you observe in that regard?

Mr. Kelley: I think this is repetition, your Honor. He testified yesterday that the Pickering governor had not——

Mr. Paine: Well, I think the Judge wants to know the details of how you determine that by looking at it, and so forth.

The Court: I'll overrule the objection.

A. As I understand it, you want to know what other examination I had made.

The Court: What you observed.

Q. What you observed in respect to the governor stop.

A. Well, the pin hadn't pulled completely out.

Q. I'm not talking about the stop on the governor.

A. Then what are you talking about?

The Court: Are you talking about the stop on the flywheel?

Q. The stop here, Mr. Janecek, the Pickering stop on the governor, which is operated and shown in Exhibit 8 by this idler pulley riding on the belt between the governor and the engine. [122]

A. Yes.

Q. Now, did you take a look at that?

A. Yes.

Q. That operates, does it not, by—when the belt is off, or off between the two pulleys, the rider pulley is counter-balanced by a weight which is shown down here in the lower left hand corner?

A. Right.

(Testimony of Jerome L. Janecek.)

Q. And when the tension of the belt is removed, this weight falls down and the idler pulley runs up and trips the mechanism on the governor?

A. Yes.

Mr. Kelley: May the record show counsel is referring to Exhibit 8.

Q. (By Mr. Paine): And you found the belt was off? A. It was broke.

Q. Where was the belt?

A. It had gone straight down, and as I described it, laid across here. Part of it was lying or hanging near the floor.

Q. Hanging from what? Was it still attached to either of the wheels?

A. It was off here, and part of it was either off that pulley or laying down here, and draped across here.

Q. Part of it was lying on the driving pulley, and the rest [123] laying on the floor?

A. Far as I know it could have been on the pulley or on this side of the pulley or down here. I won't testify to that. I don't recall exactly.

Q. But the weight had fallen and the idler pulley had moved up? A. Yes.

Q. And had that tripped the mechanism in there? A. No.

Q. That is set on a pin, or a bar, so that when the bar moves, the pin moves, doesn't it?

A. Well, there's a bar, yes, but it releases a ratchet.

(Testimony of Jerome L. Janecek.)

Q. Higher up in the governor?

A. Yes, but it doesn't show there.

Q. When the bar moves the pin moves and releases the ratchet? A. That's right.

Q. And what was it you examined there and found hadn't happened?

A. That the ratchet was still wound up.

The Court: I didn't get that last answer.

Q. The ratchet was still wound up. Now, on the day that Mr. Olinger—You know Mr. Olinger, don't you? A. Yes.

Q. He came out there, I believe it was about 2:30 on July 5, is that right? [124]

A. That's about right.

Q. In the afternoon of the 5th. This accident was the day before the 4th of July, and he got there the day after; did you and Mr. Olinger go to this device on the governor?

Mr. Kelley: I think the accident was July 3.

Q. Yes, I said July 3. The 4th was the next day, and then Mr. Olinger arrived on the 5th. That's correct, isn't it?

A. I'd say that he was there about two days later, yes.

Q. And did you and Mr. Olinger go to the device on the governor, this Pickering stop device, and test it out four or five times? A. Yes.

Q. What happened? A. It worked.

Q. It worked every time that you tested it?

A. Every time we tested it.

(Testimony of Jerome L. Janecek.)

Q. And you did that by holding this rider pulley back up in the position in which it would be held by the belt? A. Yes.

Q. And then releasing your hand from it, in the same manner as it would be released if the belt broke or was taken off? A. Yes. [125]

Q. And the weight pulled the idler pulley down and operated the device? A. Yes, sir.

Q. How many times did you try that, would you say?

A. Oh, at least three, and possibly four or five.

Q. And every time it operated? A. Yes.

Q. All right. Now, when did you first tell anybody about the fact that when you got down there the first time, right after the accident, that you found that the governor device had not operated?

A. I don't remember ever telling that to anybody.

Q. You never told it to anybody until you've told it in Court here yesterday or today?

A. Well, I don't remember telling it to anybody.

Q. Is that your best recollection, that you never told that to anybody?

A. Yes, I'd say it is. I don't remember who I told it to, if I have told it to anybody.

Q. Did you tell it to Mr. Kelley before you came in here to testify? A. I might have.

Q. Well, can't you be a little more positive than that, Mr. Janecek?

Mr. Kelley: Well, now, if your Honor pleases, this [126] has gone far enough. It was elicited on cross-examination.



(Testimony of Jerome L. Janecek.)

Mr. Paine: No, I think not, your Honor. On direct examination he went over and testified he examined it and it hadn't worked.

The Court: Overruled.

Mr. Kelley: In any event, it is immaterial. I presume he would tell a lawyer representing the plaintiff.

The Court: Overruled.

A. We've talked about this accident so many times that without a doubt that's come up many times, but as far as me saying who I first told it to, I don't know. I might have talked it over with my master mechanic, or with the insurance man, or any number of people, but I can't tell you who I first told it to.

Q. All right, I'm not too particular on who the first one was. I'd like to know positively if you told it to anybody.

A. No doubt I have, but I can't tell you who I told it to first.

Q. All right, can you tell us who you told it to at all?

A. Well, I imagine anyone that started to talk about the accident, trying to find out what had caused it, why, the same question would probably come up first.

Q. Yes, that's exactly what I supposed, Mr. Janecek, and on [127] the 7th of July the Hartford men came out there, and there was another discussion as to what had shut off this engine——

(Testimony of Jerome L. Janecek.)

Mr. Kelley: Is this for another occasion, Mr. Paine?

Mr. Paine: Yes, it is.

Mr. Kelley: July 7, still another occasion?

Q. That's right, and at that time, some extensive tests were made on the butterfly valve to see whether it had shut the engine off, weren't they?

Mr. Kelley: I wonder if counsel would fix the occasion, who was present, and what was purported to have been done?

Q. I think Mr. Janecek remembers, July 7th, with Mr. Fullmer, Mr. Olinger, and Mr. Murray of the Hartford people present, and you were present, and the butterfly valve was tested out to see if it would operate. Do you remember that?

A. I remember all these men being there, yes. I don't remember the date.

Q. Well, it was shortly after the accident?

A. That's true.

Q. And an endeavor to find out what had stopped the machine, brought it to an idling speed?

A. That's true. [128]

Q. And did you tell anybody at that time that the governor stop had not operated?

A. That the Pickering governor stop had not operated?

Q. Had not operated.

A. Not that I recall.

Q. Not that you recall?

A. No, that's right, not that I recall, if I understand your question right.

(Testimony of Jerome L. Janecek.)

Q. That's right; and you knew that that would be an important matter to determine whether the governor stop might have stopped this machine or not? A. I should say yes.

Q. Did you ever tell Mr. Black that you found the governor stop hadn't tripped, when you first went there?

A. I don't recall whether I have or not.

Q. You don't recall that you have ever told him?

A. Well, I think it puts me in the same place that we were a while ago. There's so many people, everybody that talked about the accident would naturally bring up the same subject. Now, what I told him, I don't know.

Q. Well, you knew, didn't you, that he was endeavoring to find the first person who saw that governor stop after the accident, and was contacting Mr. Coy and Mr. Wheeler with an endeavor to find somebody who had seen that condition of the governor stop for a couple of minutes [129] after the accident?

A. You mean Mr. Myron Black?

Q. Yes.

A. Well, I was just as much interested as Mr. Black was. I don't know why he should particularly ask me. I might have been asking someone else the same thing, although I was one of the first persons there.

Q. Were you asking other people what the condition of that governor stop was? That's a fact, isn't it?

(Testimony of Jerome L. Janecek.)

Mr. Kelley: Well, of course, this is improper cross-examination, wasn't brought out on direct, would be hearsay, anyway, and further, it is immaterial.

The Court: Overruled.

Q. You were asking other people, trying to find out who was the first person that saw this governor stop after the accident, weren't you?

A. Oh, no. I was about the first person, me and Mr. Coy, that saw it. I wouldn't be asking Mr. Coy or anybody else who was the first person that saw it. I don't see how I can answer that question.

Q. Well, you can answer it by telling me whether you did or did not inquire from other people if they had seen this governor stop immediately after the accident, and what its condition was.

A. I don't know how to answer that question.

Q. You don't know whether you talked to other people trying to find out if they had seen it after the accident, or not?

A. Well, I still don't know how to answer the question. I could ask people about what their opinion was of it, and had they seen it, but as far as saying that I asked other people if they had seen the governor before I did, or something like that, I can't say that I can answer that, no, because I think I was the first one that saw it, me and Mr. Coy.

Q. Now, did you conduct this examination with Mr. Coy?

A. No—you mean examination of the engine?

Q. Yes.

(Testimony of Jerome L. Janecek.)

A. Yes, we were both there together. Whether he was paying attention to what I was doing I don't know, but he was there.

Q. Did you call it to his attention?

A. No doubt I have.

Q. Well, do you have any recollection of having called it to his attention and he came over and looked at it?

A. The only thing I can say is if two people were together looking over a piece of equipment like that, they might discuss it, yes.

Q. You heard Mr. Coy yesterday testify he hadn't examined it, and didn't know whether it had tripped or hadn't tripped? [131]

A. He probably wouldn't have examined it, but he was there. I didn't say he helped me examine it, but he was there.

Q. Do you recollect whether you talked to him, and the two of you looked at it and made some comment? It was rather unusual that the thing wouldn't have acted, wasn't it?

A. I should think I might have made some comment on it, yes.

Q. But he testified to no such comments?

A. Well, I don't know.

Q. Now, I ask you if you remember an occurrence on the 4th of August, 1946, in the office of the paper mill, where you and Mr. Black have your offices, you were there, and Mr. Black was there, and Mr. Murray was there, Mr. Fullmer was there, of the Hartford, Mr. Olinger was there, and Mr. Mc-



(Testimony of Jerome L. Janecek.)

Keon was there; these gentlemen back here; you know all of them, don't you?      A. Yes.

Q. And you were discussing the situation, and what had happened, and I'll ask you if you did not in the presence of those gentlemen at that conference say that you didn't take any particular notice of the governor stop until Mr. Olinger arrived on the 5th, and you tested it out; that you didn't know whether it had operated or hadn't operated?

A. I know that it hadn't operated, but I hadn't done anything with it. [132]

Q. I'm asking——

Mr. Kelley: Go ahead and explain. If your Honor please, I think he's entitled——

Mr. Paine: I think he should first answer whether he made that statement or not.

The Court: I think he should first answer the question.

(Whereupon, the reporter read the last previous question.)

A. I don't remember saying that I hadn't taken particular notice of it, no.

Q. Would you say you did say it, or didn't say it?

A. I don't know whether I said it. I don't remember saying it.

Q. You don't remember saying it?

A. That's right.

Q. Do you remember telling that group that you had observed it and that it hadn't operated?

A. I certainly have observed it, and I would say that to them, no doubt.

(Testimony of Jerome L. Janecek.)

Q. I'm asking you if you remember making any such statement to them?

A. No, I don't, but I still say that I had examined it, and two of them hadn't worked, and one of them did; two of the safeties on there. [133]

Q. Well, the one we're talking about is the governor stop.

A. That's right; well, now, you mean the Pickering governor?

Q. Yes.

A. That's right. That one hadn't worked.

Q. And you don't remember telling that group that that had not worked?

A. No, I don't, but I believe that I might have said that, because I have said it today, and I know it to be a fact.

Q. All right, you believe that because you've said it today you might have said it then, is that right?

Mr. Kelley: I object to that form of the question, arguing with the witness.

Q. All right, we'll go on with it, Mr. Janecek. After you discussed what you had observed there do you remember that Mr. Black sent for Mr. Beguelin, the machinist who had made the stop, and who arrived at the scene of the accident about 7:30 in the evening of the 3rd, to find out what he had discovered of the condition of the governor stop; do you remember that?

A. Yes, I do.

Q. And Mr. Beguelin came to this same conference in which all these gentlemen were present, and

(Testimony of Jerome L. Janecek.)

in which you were present, and told you that when he got there at 7:30 he found the governor stop had tripped and operated, is that right? [134]

Mr. Kelley: To begin with, that's objectionable on the grounds of hearsay, and it's also not competent and material, due to the hiatus of the time; the evidence shows the accident occurred at quarter to two; now he's eliciting information as to what occurred during a sweat session with some insurance representatives a month later.

The Court: Overruled.

A. Well, I don't think Beguelin came there at 7 o'clock at night. I think he was there about 4:30, and by the time Beguelin came there two or three hours had elapsed since the accident. Now, meanwhile——

The Court: I doubt if the witness understands the question. The question was about something said in conference.

Q. I'm questioning you, Mr. Janecek, about the fact that at this conference after the discussion had taken place as to whether or not the Pickering governor stop had operated, they sent for Mr. Beguelin to find out what he knew about it, and that he came in——

Mr. Kelley: Just a minute.

Q. Just let me finish this question, Mr. Kelley; he came into this conference and in your presence stated that when he got to the scene of the accident, whether it was at 4:30 or 7:30, in the afternoon of

(Testimony of Jerome L. Janecek.)

the accident, he [135] found that the Pickering governor stop had operated. Do you remember that?

Mr. Kelley: Now, just a moment, please, while I make my objection. Your Honor pleases, I respectfully ask the Court to have counsel direct the witness's attention to a specific conference, a specific date, when he says "he," whom he means.

The Court: I thought he was talking about this conference in the office on the 4th of August.

Mr. Paine: Yes. I don't think there's any confusion between the witness and myself.

The Court: Did you specify the time?

Mr. Paine: Yes, August 4, 1946, I believe some time in the afternoon.

A. You want me to answer as to what Beguelin testified regarding the Pickering governor? I don't know what Beguelin testified.

The Court: Just a moment; this "testified"—

Q. Not testified; I'm asking if he didn't come into this conference and make the statement in your presence that the Pickering governor when he first saw it in the afternoon of the accident had operated?

Mr. Kelley: Your Honor pleases, if he seeks to impeach Beguelin, he can do that at the proper time, but that's not a proper question addressed to this witness. [136] It doesn't test his recollection as to what happened at the time of the accident. He's talking about a meeting purported to have been held a whole month after the accident.

(Testimony of Jerome L. Janecek.)

Mr. Paine: Well, the purpose of it, your Honor, this man says now he discovered this Pickering stop had operated.

Mr. Kelley: He said it had not operated.

The Court: Talk one at a time.

Mr. Paine: Had not operated. That was a matter of primary discussion between the company and the insurance people during the investigation of this accident, that he was present when that matter was being fully discussed, and gone into, in the office, with Mr. Black and the insurance people, that if he had seen this in the condition in which he now says he saw it, he would have promptly stated that fact, and it would have been unnecessary to hunt for Mr. Beguelin to find out what his observation was.

The Court: I think it is proper cross-examination. I'll overrule the objection.

A. Well, the question was whether I heard Mr. Beguelin make that statement? I wouldn't remember that. That's a long time ago.

Q. Well, it's last August. [137]

A. It's a year ago last August.

Q. A year ago last August.                      A. Yes.

Q. Do you remember anything that was said in that conference?

A. Well, I should remember some of the things, but when it comes to saying that someone said so and so, exactly, I can't do that.

Q. Well, do you remember Mr. Beguelin coming there, even?



(Testimony of Jerome L. Janecek.)

A. I think I do, but I'm not so sure. I think Mr. Beguelin was there. I know all these other gentlemen were there.

Q. And you don't remember telling them that the governor stop had failed to operate?

A. I can't tell you that.

Q. You don't remember whether you said that you hadn't paid any particular attention to it until you and Mr. Olinger examined it?

A. I hadn't taken it apart or tried to make it work.

The Court: You're getting off the track again. The questions are whether you said or didn't say something, not what you did or didn't do.

Q. Didn't you say you hadn't particularly paid any attention to it until you and Mr. Olinger went over and examined it?

A. My first interest in a case like that would be to see what made the thing fail, and that's all. As far as [138] taking it apart is concerned, I didn't. I didn't want to touch it, but I can see whether it had tripped or not.

Q. Well, your second interest would be to convey that information to Mr. Black and the insurance people, wouldn't it, if that were so, if you had examined it?

A. Perhaps, if they had asked.

Q. Wasn't the whole subject of this conversation and conference primarily dealing with whether this stop had or had not operated?

A. I should think so, yes.

(Testimony of Jerome L. Janacek.)

Q. And you have no recollection of coming forward and making a positive statement "Well, there isn't any question about it, I saw it right after the accident?"

A. That I saw it right after the accident?

Q. Yes.           A. Yes, that's right.

Q. I say, you didn't come forward and make that positive statement, or turn in any report to Mr. Black, or anything of that sort?

Mr. Kelley: I thought he testified several times he doesn't remember whether he said it or not.

The Court: Overrule the objection.

Q. That's what I'm asking, if he remembers ever doing anything of that sort?

A. No, I don't. [139]

Q. When did it first come up in discussion in connection with this trial, as to whether you had seen it or not?

A. I think it came up every time when the Hartford men came over there. The same question had been mulled over many times. Anybody discussed it.

Q. Do you recollect at any time that you ever told the Hartford men that you had seen it operate, seen that it had not operated?

A. No, I don't.

Q. Now, when you got in there into the room near the engine, I believe you testified, this may be repetition, that the room was partially filled with water and vapor, and that the engine was idling?

A. Idling, yes.

(Testimony of Jerome L. Janecek.)

Q. And that later when the steam was shut off the engine stopped? A. That's right.

Q. About how much after was it when that occurred? Maybe a minute or two, three or four?

A. There was no belt or anything on it; it was coasting.

Q. Yes, but I mean from the time that you saw it idling until the steam was shut off and the engine completely stopped?

A. I say, there was no load on it, whatsoever, no belt or anything, and it idled quite awhile. I wouldn't know [140] how long.

Q. Well, it was a minute, or a couple of minutes, or more, before the steam was shut off?

A. I'd say more than two minutes, yes.

Q. Now, about how much time was there between the breaking of the wire pulley and the later noises that you heard in the basement?

A. About one second.

Q. About one second?

A. Just enough time that you could distinguish between the two.

Q. Then the other noises in the basement started?

A. First the pulley that I could see upstairs, and the other one instantly afterwards.

Q. And how long did those noises downstairs then continue? A. Just one explosion.

Q. One big explosion?

A. Well, it was more of a thump. It didn't sound like an explosion; just the same as the pulley upstairs, when it burst there was just two thuds.

(Testimony of Jerome L. Janecek.)

Q. Now, around this number 4 machine, after everything was over, were there considerable broken pieces of pulley and line shafting scattered around?

A. Mostly downstairs, yes.

Q. Yes, downstairs, around the Sumner engine, not the paper [141] machine.

A. There was some upstairs, but mostly down stairs.

Q. Mostly downstairs around the neighborhood of this engine, there were broken pieces of pulley and the main line belt was off and the governor belt was off, and evidence that considerable commotion had taken place there, is that right?

A. West of the engine.

Q. The west part, west of the engine?

A. Yes, where the line shaft is.

Q. Where were these broken pipe fittings to the engine? Were there some smashed or broken pipe fittings?

A. Well, some of that piping runs north of the engine, and above the engine. There's piping all around, for that matter. Just which piping were broke, now, I couldn't tell you that. There was water pipe, fire lines, broken all over the place.

Q. Well, they were broken by the flying portions of the line shaft or pulleys, weren't they?

A. Yes.

Q. So that a number of those things had hit various fittings on this engine?

A. That's right—well, I'll change that; I don't know of anything hitting the engine.

(Testimony of Jerome L. Janecek.)

Q. Well, these pipe fittings? [142]

A. The pulleys hit columns and pipe and broke the pipe. I don't know of anything that hit the engine.

Q. Now, I think—maybe you're not familiar with the complaint. It alleges that portions of the Sumner steam engine which were broken in this occurrence was a broken lubricator, broken lubricator lines, several broken guards, and damage to the steam lines.

A. Well, the steam lines are not necessarily right at the engine. They could be any distance away from it. As far as the lubricator and the guards are concerned, I don't recall that.

Q. You didn't prepare for them a list of the items that were damaged?

A. I didn't make up the list.

Q. What are those lubricator lines?

A. Do you want me to show you on the picture?

Q. Yes. A. The lubricator lines?

Q. Yes.

A. There's the lubricator. Whether it was broken I don't recall. If I remember right, I thought there was some broke on there, and I'm pretty sure it was on number 3 machine, which is another engine, and I do believe that.

Q. I think this is alleged to be on the Sumner steam engine. You have only one Sumner, don't you? [143] A. One Sumner, yes.



(Testimony of Jerome L. Janacek.)

Q. And the lubricating lines, and this is the lubricator up in the left center of the picture, of exhibit number 2, is that right?

A. That's the lubricator, yes.

Q. And this is the governor right above it, is that right?

A. That's right.

Q. And this is the governor belt right beside it?

A. Yes.

Q. This is the idler pulley right next to it?

A. Yes.

Q. And that indicated that some objects had hit and dented or damaged the lubricator, and the lubricator lines in that neighborhood, didn't it?

A. I don't remember that, but I do think there was a lubricator broke, and I think it was broke on number 3, caused by the accident. There was an accident, there was some damage on number 3 engine.

Q. Where is number 3 engine?

Mr. Kelley: We're not claiming any damage on number 3.

Mr. Paine: Well, maybe counsel will stipulate that the damage to the lubricator is on number 4 engine?

Mr. Kelley: No, we'll stand on our pleadings.

Mr. Paine: Well, your pleadings allege that there [144] was damage to number 4 engine, don't they, Mr. Kelley?

Mr. Kelley: I understand.

Mr. Paine: And you'll stand on your pleadings?

(Testimony of Jerome L. Janecek.)

Q. (By Mr. Paine): Now, this butterfly valve you say is operated from a mechanism on the fly-wheel? A. Yes.

Q. And what you observed, that shows here on the exhibit number 11, down in the center, that that had tripped out down there by the centrifugal force, is that right? A. Yes.

Q. And that has to be relayed through a wire up to the handle on number 8, the chain of some sort? A. The chain.

Q. Is that right? A. That's right.

Q. And what you observed was that this mechanism down here on the wheel was in a tripped position? A. That's right.

Q. Whether the slack had released this weight which was still held up here by the pin you don't know, do you?

A. Give me that question again.

Q. I say, whether any slack there had released enough to release this weight on the butterfly valve, which is also connected up in the safety pin device——

A. There is slack enough, chain enough, to shut the butterfly [145] valve, yes.

Q. Enough to shut the butterfly valve?

A. Yes.

Q. How could you tell that?

A. Because the engine was idling.

Q. You concluded that from the fact that the engine was idling, isn't that right? A. Yes.

(Testimony of Jerome L. Janecek.)

Q. What speed is that automatic device set at on the flywheel, to operate?

A. The automatic trip?

Q. Yes.

A. I'd say about 710 feet, on the paper machine. That's where we try to keep it.

Q. Well, how many revolutions a minute on the flywheel, about 250?      A. About 275.

Q. About 275, so that if it operated it would shut the machine off when the flywheel goes about 275?      A. Very close.

Q. If it didn't operate, or the flywheel had attained speeds in excess of that, it would indicate that it hadn't operated, wouldn't it?

A. I didn't quite get that.

Q. If the wheel went on up, for instance, to destruction, [146] it would be conclusive proof that it hadn't operated, wouldn't it?

A. That's right.

Q. If the wheel went up to a speed of 800 R.P.M. a minute, it would be an indication that the device, while it might have tripped out at the wheel, hadn't operated the butterfly valve at 250 revolutions, wouldn't it?      A. I would think so, yes.

The Court: Any further questions on cross-examination?

Mr. Paine: No, I think that's all.

### Redirect Examination

By Mr. Kelley:

Q. Mr. Janecek, I believe you stated in response to counsel's questioning that two of the stops had

(Testimony of Jerome L. Janecek.)

not worked, and one stop apparently was tripped, is that correct?      A. Yes.

Q. Now, by the two stops which had not worked, you mean first the pin in the safety chain——

A. Yes.

Q. ——to the butterfly valve, as shown in exhibit 8?      A. Yes.

Q. That had not worked. Now, by the second stop that had not worked, you are referring to the automatic arrangement on the belt of the pickering governor, which is supposed to work if the belt of the Pickering governor [147] breaks, is that correct?      A. Yes.

Q. Now, with respect to the third stop you mentioned, you're referring to the fact that this Brownell overspeed stop on the flywheel of the engine had apparently been tripped in some manner?

A. Yes.

Q. You do not want the Court to understand that it had been tripped in the usual manner by the safety chain?

A. That's right, it wasn't tripped by the safety chain.

Q. Nor do you want the Court to understand that this third safety——

The Court: I don't believe it's necessary to have him say what he wants me to understand. I think it is clear. There's no doubt in my mind, and I don't think there can be any doubt in the record what he meant as to the two devices not working and one of them working.

(Testimony of Jerome L. Janecek.)

Mr. Kelley: I had in mind, your Honor, a question on cross-examination, a question that was perfectly framed to the effect that the stop was thrown out by centrifugal force, and this is preliminary to show that the trigger could have been operated by many things besides the way it was supposed to be operated.

The Court: Oh, I didn't get that. You can go into [148] that if you wish.

Mr. Kelley: It's preliminary.

The Court: I didn't know there were other ways of tripping it besides the centrifugal force of the flywheel.

Q. Now, counsel asked you a moment ago, Mr. Janecek, concerning the main line belt, and you stated that that was off, or at least you had observed it was slack? A. Yes.

Q. Now, just tell the court what main line belt you're referring to. Point it out on the exhibit.

A. It's this belt here.

Q. Yes; you're indicating on exhibit 4. Now, what kind of a belt is that?

A. That's a nine ply, 22-inch rubber belt. It's about 47 feet long.

Q. State whether or not—what was its characteristics as to whether or not it was stiff?

A. It is a very stiff belt. Nine ply is an unusually thick belt.

Q. And state whether or not it was slack when you observed it after the accident?

A. Oh, yes, it had moved about—no less than eight feet from its westward position. It moved eight foot in. That would make it very slack. [149]



(Testimony of Jerome L. Janecek.)

Q. And how far is that main line belt from the trigger of the third stop as shown in exhibit number 11, concerning which you were questioned?

A. It would be about one-quarter of an inch.

Q. When the belt is slack could it move sideways?

A. It could.

Q. If the belt went toward the flywheel of the Sumner steam engine, what direction would it go?

A. North.

Q. And if it went north when it was slack and the wheel were turning, what would happen?

A. It would bounce.

Q. Which way would it bounce?

A. Naturally, away from the flywheel, from where it bumped against.

Q. And could the belt have hit this trigger shown in exhibit 11, when it was slack and moving sideways?

A. It certainly could.

Q. Now, Mr. Janecek, going back to the time that you came down in the basement there, right after the accident, did you touch the Pickering governor at that time?

A. No.

Q. You looked it over, as you testified?

A. That's right.

Q. Does this exhibit 11 accurately portray the fact that the [150] trigger of that third stop is practically flush with the base of the pulley of the flywheel of the Sumner steam engine?

A. You mean the part stationary there?

Q. Yes.

A. It looks very near right, yes.

(Testimony of Jerome L. Janecek.)

Q. Now, you've discussed a number of times with Mr. Fullmer and Mr. Olinger of the defendant Hartford Insurance Company as to the Pickering governor not functioning?

A. You say have I discussed it?

Q. Have you, yes?

A. It's a subject that's always been brought up, yes.

Q. You don't recall all of the times and the occasions, or who was present?

A. That's right.

Q. Do you know what the holding and opinion of Mr. Fullmer and Mr. Olinger was as to the breaking of the Pickering governor, before the representatives came out here from Hartford, Connecticut?

Mr. Paine: I object to that, if your Honor please. I think it is wholly immaterial what the local inspectors' opinions might have been at the preliminary stage of this.

Mr. Kelley: It's about as material as that cross-examination.

The Court: Sustain the objection. [151]

Mr. Kelley: I had in mind, your Honor, some development of that.

The Court: You can go into other conversations at those meetings, but your asking now what their opinion was. What they said at that meeting might be material.

Q. Do you know what either Mr. Olinger or Mr. Fullmer has said concerning the Pickering governor?

(Testimony of Jerome L. Janecek.)

Mr. Paine: I object to that, your Honor. I think it would be perfectly proper for him to go into anything that was said by Mr. Fullmer or Mr. Olinger as to conditions that they observed in connection with this accident. I think mere discussions of what their conclusions might be, based upon Mr. Janecek's testimony or Mr. Coy's testimony, is immaterial. All I was getting from Mr. Janecek was his statements of fact as to his own personal observations and what he had told in regard to them. If he has anything definite, a statement that he wants to show Mr. Fullmer said on a certain day he saw this or that, I would have no objection to it, but mere hypothetical discussions back and forth, it seems to me is immaterial, and would lead to endless arguments. There have been all sorts of arguments and theories. That's wholly immaterial.

The Court: I don't think that is proper redirect. As I recall, the cross-examination was whether Mr. [152] Janecek had or hadn't made certain statements in regard to this machine, and there's nothing that could have been said in reply, because he doesn't remember saying anything. Sustain the objection.

Q. Do you recall Mr. Fullmer telling you the cause of the accident was the breaking of the Pickering governor?

Mr. Paine: I object to that. Mr. Fullmer was not present, and some statement of fact as to what he might have concluded at some stage in the investigation is wholly immaterial and irrelevant.

(Testimony of Jerome L. Janacek.)

The Court: Sustain the objection.

Q. Do you recall Mr. Olinger telling you the cause of the accident was the breaking of the Pickering governor?

Mr. Paine: Same objection.

The Court: Sustained.

Q. Do you recall Mr. Fullmer and Mr. Olinger at a meeting on or about August 4, 1946, telling you that the cause of the accident, in their opinion, after their investigation, was the breaking of the Pickering belt?

Mr. Paine: Same objection.

The Court: I ruled on that.

Mr. Kelley: Well, I was laying this because I'm going to make a formal offer.

The Court: Well, make your offer.

Mr. Kelley: I offer to prove by this [153] witness that on or about August 4, 1946, or at least some weeks after the accident on July 3, 1946, Fullmer and Olinger, representatives of the defendant Hartford Insurance Company, told this witness that in their opinion the cause of the accident was the breaking of the Pickering governor and it failed to function.

The Court: I would like to ask this: Is it your theory that that is binding on the insurance company, or is competent evidence of the manner in which the accident occurred?

Mr. Kelley: I think both, if your Honor please.

The Court: You're objecting?

Mr. Paine: I object to the offer.

(Testimony of Jerome L. Janecek.)

The Court: The objection will be sustained to the offer.

Q. I believe you stated in response to counsel's questioning that broken pipe fittings were all around this Sumner steam engine after the accident?

A. All over the basement, yes.

Mr. Kelley: That's all.

#### Recross-Examination

By Mr. Paine:

Q. Just one or two questions, your Honor. I didn't quite get what you testified to in regard to this belt that's down on the main engine wheel, where the automatic safety device is located. As I understood you, you said that in [154] your opinion, after the engine had speeded up to the point where the belt broke or came off the pulley, that in coming off the pulley, the belt might dislodge or hit this safety device, is that right?

A. That's right.

Q. And as far as your observation of it was concerned, this device might have been knocked off or knocked open by that hitting of the belt at the conclusion of the sequence of events?

A. That's right.

Q. It might not have operated at all merely by centrifugal force, but was knocked off at that time?

A. Could be.

Q. And at that time it might still then not operate the chain to the butterfly valve, is that right?



(Testimony of Jerome L. Janacek.)

A. Well, if it tripped it, the chain to the butterfly valve should be slack enough to operate the butterfly valve.

Q. Should be, but with all the commotion and excitement that existed, nobody knows what the condition was?

A. That's the reason we carry a weight on there, so it does, as soon as that chain is released.

Q. As soon as the chain is released you carry a weight on it?

A. As soon as that trigger is tripped the chain has to be released.

Q. And that may have occurred when at the conclusion of the [155] accident the belt came off, at the time this may have tripped?

A. When this line shaft broke and the belt came this way eight feet, it could have danced all around that,

Q. It could have danced sideways against the pulley; it could not only have hit this down inside the flywheel, it could have flopped up and hit the engine; it might have damaged the lubricator?

A. No, there's a limited space for that belt to run. All this frame-work won't allow it to go back there.

Q. Well, up here it's in the open?

A. Yes, but it can't get out of here very well. Here's the floor, here's the frame, the belt is too stiff to go down in that opening.

(Testimony of Jerome L. Janecek.)

Mr. Kelley: May the record show the witness is indicating the opening on the east end of the main line belt attached to the Sumner steam engine, as shown in Exhibit 11.

The Court: Yes.

Q. By the time this belt came off practically all of the damage had been done, hadn't it? It was about the last thing to see the effect of the explosion?

A. As long as there was no one down there it's pretty hard to tell which part of the line shaft broke first.

Q. Well, don't you know it was the pulley on the far end [156] that exploded first?

A. Upstairs.

Q. And dis-engaged the line shaft, and then started the line shaft gyrating?

A. That's only a guess.

Q. That's your assumption, isn't it?

A. Could be, yes.

Q. And that gyration followed back to the line drive wheel of the engine? A. Could be.

Q. And by that time the machine was slowing down, wasn't it, coming to a stop?

A. It took me probably three or four minutes before I got down there. By the time we had the steam cleared away a little bit, why, I don't know whether it was idling immediately when I got there or not. I'd say the first time I saw the engine it was idling.

(Testimony of Jerome L. Janecek.)

Q. The first time you saw it it was idling.

The Court: Any further questions?

Mr. Paine: No, your Honor.

### Redirect Examination

By Mr. Kelley:

Q. While you're here, you referred a moment ago to this wire pulley. Is that the one shown in Exhibit 7?      A. Yes.

Q. And is that upstairs? [157]

A. That's upstairs.

Q. Not located on the main shaft as shown in exhibits 3 and 4?      A. No.

Q. However, that pulley receives its motive power from the Sumner steam engine shown in exhibit 8?      A. That's right.

Q. There's no other source from which that pulley can be made to go fast?

A. Yes, there is not.

(Whereupon, there being no further questions, the witness was excused.)

### JUSTIN H. WHEELER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

### Direct Examination

By Mr. Kelley:

Q. Your name is Justin H. Wheeler?

A. That's correct. Just a minute. Your Honor, I have to request that the questioners speak a little loud, because I'm a trifle hard of hearing, and I have a bad cold which aggravates it.

(Testimony of Justin H. Wheeler.)

The Court: If you don't hear, just say so, and we'll have them repeat the question in a louder tone.

Q. You're engineer and operator for the Inland Empire Paper Company? A. I am.

Q. How long have you been with that company?

A. Well, a trifle over thirty years.

Q. And directing your attention to July 3, 1946 when the accident we're discussing happened, what shift were you on?

A. I was on the afternoon shift, 3 to 11.

Q. 3 p.m. until 11 at night?

A. That's correct.

Q. Do you recall when you came to the mill that day, with respect to the happening of the accident?

A. I do.

Q. Was it before or after the accident?

A. Well, it was after the accident.

Q. And when you came to the mill, July 3, 1946, did you go to the basement where the Sumner steam engine is located?

A. I did. I went past the engine in question.

Q. And did you observe that engine?

A. I did.

Q. Did you observe the Pickering governor on that engine? A. I did.

Q. Was that Pickering governor tripped?

A. It absolutely was not.

Q. Did you have charge, yourself, of the Sumner engine? Was the Sumner steam engine part of your duties, to service? A. It was, yes.

(Testimony of Justin H. Wheeler.)

Q. Can you tell the Court why the Pickering governor had not tripped? [159] A. I can.

Q. Did you observe where the belt of the Pickering governor, to which I am directing your attention on Exhibit 8, do you know where that belt was?

A. It was off, it was gone, lying on the floor.

Q. Did you look at the idler arrangement on the Pickering governor? A. I did.

Q. Did you observe the screws which were holding the arm on to the shaft of the Pickering governor? A. I did eventually, yes.

Q. And what was their character?

A. Well, the apparent reason was that that set screw, there was an old key in that little shaft that operates the trigger that kicks out the dog on the ratchet, which releases the governor and closes it, and that set screw had evidently worked loose enough so that this arm that comes down and engages with the rod that was fastened to the tighter pulley moved the rod, the rod was loose on the trigger shaft, so that it did not touch the dog on the ratchet enough to throw it out.

Q. That was the reason why the Pickering governor didn't shut off automatically after the belt broke?

A. That's absolutely the reason. I might add, if permissible, that we have to change those belts when we change speeds [160] on the engine, change not only from the belt but from one pulley to another, sort of a cone pulley operates, when we go on slow speed we have to stop and change from



(Testimony of Justin H. Wheeler.)

one set of pulleys and belts to the other, and the day before, in the afternoon, sometime during the evening shift, I had reason to change those. We changed the speed, and when you change you have to hold that tightener pulley up off so to get your belt slack, and it was a rather difficult matter to do, to hold it with one hand and change the belt with one hand, and occasionally that tightener pulley will get away from you and drop, and that kicks out, of course, and the day before I had that same experience; I was in a hurry and I accidentally dropped the tightener pulley, and it kicked out, and I had to set it, and I was curious to know the reason it didn't kick out at the time of the wreck. I noticed it was not kicked out. The butterfly in the steam pipe was out, but not that.

Mr. Kelley: You may inquire.

#### Cross-Examination

By Mr. Paine:

Q. Mr. Wheeler, what time was it you said you got there?      A. Beg pardon?

Q. What time was it you said you got there?

A. Well, somewhere between 2:15 and 2:30. I couldn't say exactly. That's the usual time that I go in. [161]

Q. 2:15 or 2:30?

A. Yes, somewhere in that vicinity. Not earlier than 2:15, and I doubt if it was much after 2:30, because we're supposed to take over at 3 o'clock or earlier, and of course we have clothes to change and so on.

(Testimony of Justin H. Wheeler.)

Q. At that time you say the belt was on the floor?      A. Yes.

Q. Was it hanging on any of the pulleys?

A. No, it lay virtually in the alleyway.

Q. Did you examine the belt?

A. Well, enough to see it was broken.

Q. What sort of a break was it?

A. Well, it wasn't exactly square across, I don't think. I don't recall exactly. It was broken; I'm sure it was broken.

Q. You're sure it was broken?

A. Yes, that part I'm sure of.

Q. I'll show you defendant's identification 12. Does that look like the belt? Does it have a fastener of that sort?

A. Yes, that's the type of fastener we use on those belts, but as far as that being the identical belt, I wouldn't say. There might be a hundred of them around in the condition that is, old belts; as I say, I wouldn't positively identify it. [162]

The Court: That's all right.

Q. I don't ask you to, but you say that is similar to it?      A. Similar to it.

Q. You say you had around the shop hundreds of these old belts of the same description?

A. Yes; three or four hanging on the hook right there.

Q. You have to change those belts quite frequently?

A. Yes, every time we change from high speed to low we have to make that change.

(Testimony of Justin H. Wheeler.)

Q. Do you change this belt from the main engine to the pulley drive, or just on the cones?

A. Just on the cones.

Q. But this belt, when it breaks or gets old you change it? A. When we figure they're unsafe.

Q. Sometimes you don't know that until they break, and then you put it on?

A. That's very true.

Q. I mean this belt breaks there frequently, and you go over and grab another one off the wall and put it on? A. We always keep spares.

Q. And when the belt breaks the automatic device stops the engine, you put the belt on, and away she goes? A. Yes.

Q. That's a common occurrence?

A. That's what should be. [163]

Q. And I say, that's a common occurrence?

A. Yes.

Q. And the day before this, you did some changing of the cone belts to change the speed of the engine? A. Yes.

Q. What were you doing, speeding up or slowing down?

A. I don't recall now which it was, because we make so many changes, and it was a thing that I didn't carry in my mind. I couldn't say whether I was changing from high to low or the other way, but I did drop the arm of the counter-balance on that tightener pulley, and it kicked out, but I positively could not say which I was doing, from high to low or reverse.

(Testimony of Justin H. Wheeler.)

Q. But when you released this belt and then you had to stand there to hold one hand on the idler pulley, as if the belt were on it, you dropped the idler pulley and the automatic device kicked out?

A. Yes.

Q. Now, had you actually changed this belt from the driving pulley to the governor pulley that day, or just the other belts?

A. I think it was the other belt. I'm not positive of that.

Q. Well, then, if it was just the other belt, wouldn't this belt hold the idler pulley up in place?

A. Maybe I don't just understand the question.

Q. Well, come down here. Pointing to Exhibit 8, the little wheel here in the center is what's known as the idler pulley, isn't it?

A. That's right.

Q. And that you said you held up with your hand?

A. This is the weight that's supposed to hold that up; well, we keep it fastened with a chain here, because the weight really doesn't give quite enough pull on the belt, so we fasten that, and when we change, we unhook our chain here and hold this up so it takes the tension off of the belt, and we have to hold that up while we take this belt off, and put the other belt over. Now, this is on the high speed, and the slow speed, the belt goes over on the smaller pulley, which is directly behind this one, and then runs on this big pulley here.

Mr. Kelley: May the record show that the witness's testimony is pointing out and illustrating by Exhibit 8?

The Court: Yes.

(Testimony of Justin H. Wheeler.)

Q. Then which belts or belt was it that you changed the day before?

A. Well, as I say, I do not recall whether I was changing from high to low, or the reverse. I was changing it, but I would not say whether we was going from high to low or the other way. [165]

Q. Well, was it these belts that operate on the cone pulleys?

A. Oh, no. It was just this one belt. We only change the one belt.

Mr. Kelley: Are you indicating the belt on the Pickering governor?

A. The one on the Pickering governor.

The Court: I wonder if counsel isn't talking about one thing, and the witness another. He said "change the belt"; I don't think he meant replace the belt, just change from one to the other.

Q. (By Mr. Paine): Is that right, when you use this other pulley you have a different sized belt?

A. Yes, different length.

Q. So if you had that one on that day, and you wanted to come back to the shorter, is this the shorter of the two belts shown in the picture?

A. This is the shorter of the two belts.

Q. So that if you took the longer of the two belts off, then you would go over to the wall some place and pick out a shorter belt and put it on here, and that's what you did that afternoon. Of course, this is a picture taken some time later. You don't know which it was, whether you took a longer one off and put on a shorter one? [166]



(Testimony of Justin H. Wheeler.)

A. I don't recall, but I might add that belt might have been changed a couple or three times between the time I changed it and the time it was wrecked, because we sometimes have small orders of paper and we don't run but a short time on a certain speed.

Q. So someone else might have changed it after you did?

A. Absolutely; the man that was on shift did it, if it was done.

Q. You go to the wall and pick one off?

A. We pick the one that belongs in the place where it wants to go.

Q. But in doing that, as you said, you had to then hold the rider pulley up, and you let it fall to get your hand free, and that shut the engine off, as it should do?

A. Well, the engine was stopped. We don't do that when the engine is running.

Q. My error. You'd get in a lot of trouble if you did that. The engine was off, but it still kicked this device?

A. It kicked out.

Q. As it would have done if it had been running. Now then, you came back about 2:30 and you're quite positive that you went and found this device hadn't operated?

A. I noticed it when I walked by the engine. I had to go by the engine to go to my locker to change my clothes. I noticed the butterfly was out, and the Pickering was [167] not out.

(Testimony of Justin H. Wheeler.)

Q. And did you later in the day make some tests on it with Mr. Olinger?

A. Well, after he came. He wasn't there at the time I took over the shift.

Q. Yes; not that day, but—yes, he got there—no, he didn't get there until the 5th.

A. No, he wasn't there that day.

Q. On the 5th you made some tests with him?

A. Well, we looked it over, yes. I looked it over with a half dozen different men, not only my partner, but with Mr. Janecek and the insurance men also. We looked it over.

Q. And at that time you found that it didn't work?

A. Well, I found that the first time, the first thing.

Q. Well, you found that it hadn't worked, the first thing, but did you try it after that?

A. Well, you could work it by hand.

Q. You could work it by dropping the rider pulley?

A. No, not until after they tightened the set screw.

Q. Now, let's get to this set screw. This set screw is a little screw that goes into this—what do you call it, the trigger arm? A. Well, yes.

Q. That comes down and lies on the plate? [168]

A. Well, it has an eye in the end.

Q. It comes into a rod here and is fastened with a little screw that goes down and rests or bites into this arm, is that correct? A. That's correct.

(Testimony of Justin H. Wheeler.)

Q. And that's a little inset hexagon screw; you have to have a special wrench to loosen it or tighten it?

A. No, the set screw in there was an ordinary set screw with a square head, which stood up; it wasn't a sunken set screw.

Q. It wasn't a sunken set screw?

A. Not at that time.

Q. You feel quite sure about that?

A. I am.

Q. It had a little head on it that you could turn?

A. A square head.

Q. Could be tightened or loosened by anybody applying a wrench to it?

A. That's right.

Q. If anybody had touched that or loosened it it would be loosened up?

A. It could be, if anyone would, but I don't know why anybody would; it was under that plate which holds the outboard bearing of the governor shaft. It was in a kind of a peculiar place to get at anyway. That's one of the [169] reasons why it probably hadn't been looked after, was it being up there out of sight, and it was tight the day before, and it was tight when it was put on. It just naturally worked loose.

Q. And it was tight the day before?

A. Enough to hold so that it tripped.

Q. And did you hear Mr. Janecek's testimony that after this he operated it four or five times, three or four times, with Mr. Olinger?

A. No, I didn't. I couldn't hear any of the testimony.

(Testimony of Justin H. Wheeler.)

Q. Did you ever talk with him or learn from him that it operated four or five times, every time they tried it, after the accident?

A. No, I didn't

Mr. Kelley: That's incompetent, if the Court please, after the accident.

Mr. Paine: We've got it tight immediately before the accident and immediately after the accident.

The Court: He's answered that he didn't talk with Mr. Janecek. A. Beg pardon?

The Court: As I understand, you said you didn't talk about it with Mr. Janecek?

A. No.

The Court: All right, go ahead. [170]

Q. (By Mr. Paine): That screw could be loosened by applying a wrench to it and loosening it up?

A. Certainly.

Q. Do you think it could be loosened by merely operation of the machine itself?

A. Vibration; there's a certain amount of vibration on those high speed engines.

Q. And do you go around frequently and tighten it up, keep it tight?

A. Well, probably not as often as we should have. I'll admit that on my own part, but those machines are in continuous operation 24 hours a day and a good deal of the time seven days a week.

Q. And they require a constant tightening of that screw; it should be kept tight?

(Testimony of Justin H. Wheeler.)

A. There's lots of things that require tightening, and we do tighten them, absolutely, where it has to be done, absolutely necessary.

Q. Now, in regard to the butterfly valve, you found the lever down, is that what you mean?

A. Yes, that was down.

Q. You didn't at that time look to see how far or what the butterfly valve had done in the way of closing the steam line?

A. No, I just inferred it was down to the seat. I couldn't [171] positively say, although I know the lever was hanging down very nearly straight.

Q. Now, there have been several occasions out there where with the butterfly valve closed the machine has operated and the paper machine has run?

A. There's very few of those butterfly valves that close absolutely tight so but what there's a little steam leaks through, and especially if the engine is running before it does kick out, it will continue to revolve at a slow speed.

Q. Well, it has continued to revolve sufficiently fast to operate the paper machine on occasions; do you remember that?

A. Well, I don't recall any circumstances where it did.

Q. Don't you remember telling the Hartford men that there were occasions where the paper machine had operated with the lever in a dropped position?

A. No, I don't remember.

Q. You wouldn't say you didn't?



(Testimony of Justin H. Wheeler.)

A. I don't think I did, because I don't think steam enough would get through to do that, unless it was on a heavy sheet and a very slow speed. Those engines, this engine in particular, we operate anywhere from 25 revolutions a minute up to 230.

Q. Now, you remember when they conducted the tests there of [172] the butterfly valve and you were on the throttle, I think it was on the 5th of July, or the 7th of July, they were out there and ran the engine and operated the butterfly valve, on the 7th of July? A. I couldn't tell the date.

Q. But you remember the circumstances?

A. I remember about their being there several times.

Q. Well, do you remember tests that were made by the Hartford men within a day or two after the accident; you were on the throttle and they operated the machine and closed the butterfly valve?

A. Yes.

Q. And the machine ran away, and you had to shut it down with the throttle; do you remember that?

A. Yes, there was no load on it; that was just the engine itself.

Q. The engine itself, but without a load on it, the engine ran away and to save it you had to operate the throttle and stop the steam?

A. I stopped it with the throttle.

Q. Because it was running away?

A. It was running too fast.

(Testimony of Justin H. Wheeler.)

Q. With the butterfly valve presumably in the closed condition? A. Yes. [173]

Q. Now, if anybody had wanted to tamper with the Pickering governor so that it would make it in-operative, all they'd have to do would be to turn that little set screw a short turn and then it wouldn't operate?

Mr. Kelley: I object; that's incompetent, irrelevant and immaterial. I'm a little diffident about objecting. We haven't a jury, and I realize your Honor probably allows many things you wouldn't if we had a jury.

The Court: I'll sustain the objection to that. I think that's obvious.

Q. (By Mr. Paine): Do you remember what you said to Mr. Olinger the day you and he went over to try the Pickering governor? Did you say something to the effect "I'll show you why this thing didn't operate, or what cause the accident"?

A. I think I told him about the levers being loose, on the trigger.

Q. All right. Now, then, when was it that you found that it was loose on the trigger?

A. As soon as I made the examination.

Mr. Kelley: That's repetition, if your Honor pleases.

A. That was one of the first things I did, virtually the first thing I did after I took over the shift and checked [174] my other engines, I examined that, because I wanted to know why it didn't trip out when it tripped out the day before, when I was

(Testimony of Justin H. Wheeler.)

changing the belts. I couldn't understand that, but it was easy enough to see, for me, being familiar with it, that that rod was loose on the trigger finger so that it didn't trip.

Q. Did you touch the mechanism at 2:30 and do anything to it?      A. No, sir.

Q. You just looked at it?

A. I just looked at it.

Q. By merely looking at it, all you could tell was it hadn't tripped, isn't that right?

A. I worked the end of the rod.

Q. All right.

Mr. Kelley: Let him finish, please.

Q. (By Mr. Paine): That's what I want to get at, whether you touched it or what you did with it.

A. I touched the end of that trip rod enough to see that it was loose on the trigger finger rod. That's the way I determined it was loose. I had to take the end of it and moved it a little, and it didn't move the trip rod, the trip finger.

Q. Did you touch the set screw?

A. I didn't, no. [175]

Q. Then how would you account for the fact that after that it worked four or five times, correctly every time?

A. I have no explanation, no explanation whatever for that. I'm simply telling you what my observation was when I took over.

Q. Did you make any statements before that all you had ever done was to look at that device, that you hadn't tampered with it or touched it?

(Testimony of Justin H. Wheeler.)

A. No, I don't think anybody ever asked me anything about it.

Q. You don't think you were ever asked that. When was it you first told Mr. Black or any of the company people about the fact that you had observed it being not tripped?

A. When did I first tell them?

Q. Yes.

A. Oh, I couldn't say whether it was that same day or not.

Q. Well, wasn't it some time later they were trying to get in touch with you to find out who was the first person who had seen this governor stop and what condition it was in, you were called in to tell them, and you told them?

A. I don't recall that. There was so many people around there that I wouldn't absolutely say there wasn't but I don't recall it. [176]

Q. Yes; well, that's all right. Do you remember telling Mr. Fullmer, the inspector from the Hartford, when he first questioned you about it, that you didn't know what the condition of the governor trip stop was?

A. No.

Q. You never told him that?

A. No.

Q. And did you tell them when you were present there on July—no, the August meeting, when they were all out there about the 2nd of August, that you never touched the trip device on the governor?

A. That I never touched the trip device?

Q. Yes, when you looked at it that you never touched it.

(Testimony of Justin H. Wheeler.)

A. I didn't touch the screw; I just touched the end of that rod so to see it was loose on the trigger arm.

Q. Did you tell them you never touched any of it?  
A. I don't think I did.

Q. You don't think you said that?

A. No, sir.

Q. Did you ever see anybody else the day of the accident around the device or doing anything with it, touching it?

A. Well, I saw any number of them around looking at it. I couldn't positively say whether they touched it or not, because I was on shift and I had my other duties to do, and I wasn't watching them at all. I satisfied myself [177] on the start of what the cause was, that it didn't trip, and then I let the rest of them form their own conclusions. As I say, I was busy with my other duties. I had three other engines to service and watch, and I paid no attention to them. Part of the time I'm out of the room.

The Court: You've answered the question now.

Mr. Paine: I think that's all.

Mr. Kelley: That's all.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)



Spokane, Washington, Wednesday, October 8, 1947,  
1:30 o'clock P. M.

(All parties present as before, and the trial  
was resumed.)

FRED BEGUELIN

called as a witness on behalf of the plaintiff, being  
first duly sworn, testified as follows:

Direct Examination

By Mr. Kelley:

Q. Your name is Fred Beguelin?

A. That's right.

Q. And what job do you hold with the Inland  
Empire Paper Company? [178]

A. Master mechanic.

Q. How long have you held that position at that  
company? A. About five years.

Q. How long have you been associated with that  
company? A. 23 years.

Q. Outline in a general way the nature and ex-  
tent of your duties as master mechanic there at the  
Inland Empire Paper Company?

A. I was simply in charge and responsible for  
the operation and maintenance of the plant.

Q. Machinery? A. Machinery.

Q. Including the Sumner steam engine and the  
main line shaft and the number 4 paper machine  
here under discussion? A. That's right.

Q. Were you at the plant of the Inland Empire  
Paper Company when this accident happened on  
July 3, 1946? A. No, I wasn't.

(Testimony of Fred Beguelin.)

Q. When did you get to the plant that day, if you did get there that day?

A. Sometime in the late afternoon; it was after 4:30, I'm positive.

Q. And when you were there did you observe the main belt leading from the Sumner steam engine to the main line shaft in the basement? [179]

A. Yes, I did.

Q. Will you just tell the Court in your own words where the main belt was when you saw it, and as to whether or no it was loose or slack?

A. Well, the belt was very loose, and the pulley had pulled forward and toward the north, oh, approximately 8 to 10 feet from where it should have been.

Q. By the way, by the pulley, what pulley are you referring to?

A. The driven pulley from the engine.

Q. Is that the pulley set forth in Exhibits 3 and 4?

A. That would be this pulley.

Q. You're indicating the pulley in the lower left hand corner of Exhibit 4?

A. That's right.

Q. What kind of a belt was that main belt?

A. It was a heavy rubber belt, nine ply.

Q. Where was this belt when you saw it the day of the accident?

A. Well, the belt was lying on the floor, and it was around the twisted line shaft and the broken parts of the pulley.

Q. When that main belt is slack or loose, as you testified, was it possible for it to move sideways at the time of the accident? [180]

A. I would say it would be, yes.

(Testimony of Fred Beguelin.)

Q. And if it went toward the north what object would it touch? A. The fly-wheel.

Q. And if it had touched the fly-wheel while that was in motion, what would have resulted?

A. Well, I imagine the belt would just about have to move in the other direction at the other end, I suppose.

Q. And if it moved in the other direction, would that be to the south? A. It would, yes.

Q. State whether or not that would be in close juxtaposition to the trigger that I'm indicating on Exhibit 11? A. Yes, it would.

Q. If you know, about how far is that trigger from the main pulley there that the main belt is driving?

A. Well, it's dead in line, I think almost exactly in line, with the face, and perhaps half or three quarters of an inch away from the rim.

Q. Could this main belt have hit the trigger by the fact that it was slack? A. It could.

Q. Now, that trigger operates what is known as the Brownell [181] overspeed stop?

A. That's right.

Q. Had you ever overspeeded this Sumner steam engine to the tripping point of the Brownell overspeed stop, before this accident? A. Yes.

Q. Do you have any idea how long before?

A. Well, I would think it was two or three months before that I done that.

Q. And did you do that overspeeding while it was connected with the main line shaft?

A. That's right.

(Testimony of Fred Beguelin.)

Q. By the way, the day of the accident and subsequent you had occasion to survey the nature and extent of the damage there at the plant?

A. I did.

Q. And did you observe any damage to the main line shaft??

A. Yes.

Q. In a general way tell us what that was. For your information, Mr. Beguelin, it's already been stipulated as to the amount, but if you could just in a general way indicate the character and nature of that damage.

A. Well, it was just a tangled mess lying on the floor away from the line shaft bearings. It had been more or less corkscrewed and twisted all over the basement; [182] bearings were broken, couplings were broken, pulleys all smashed.

Q. Are there any windows in that plant, in the basement?

A. Yes.

Q. Did the damaged parts have any effect upon those windows?

A. It broke several windows.

Q. Do you know whether any of the damaged parts went out of the window?

A. Yes.

Q. Do you know what they were?

A. Well, there was a piece of a spoke and hub, If I remember right, of a pulley, found outside about 300 feet, I imagine, from the building.

Q. Was that a good sizeable piece of the machinery?

A. Oh, I would say it would weigh about 35 or 40 pounds.

(Testimony of Fred Beguelin.)

Q. And it had been hurled a distance of what?

A. Oh, two or three hundred feet.

Q. Now, going back to the time that you overspeeded the Brownell overspeed stop, this material that you've just referred to as being damaged by the accident, was that all running at the time you did your overspeed test? A. It was.

Q. By the way, do you know what the speed of the Brownell overspeed stop was set at? [183]

A. Well, we tried to keep it as near 700 feet as we could.

Q. Why was that?

A. Well, the speeds that they operated at were around 670 to 690, and we kept it as close to that as possible.

Q. Going back to the time that you tested it by overspeeding, was any of this machinery of the mill damaged by the test? A. No.

Q. Or by any such overspeeding? A. No.

Q. How did the you test the Brownell overspeed stop?

A. By opening the throttle wide open and screwing the cone belts on the transformer over to and beyond where the highest speed we operated. There's a chart on there that gives the different speeds, and you go beyond that, and that keeps the governor at a uniform speed, but speeds up the engine.

Q. What is the construction of that engine pulley on which the main belt to the main line shaft rested?



(Testimony of Fred Beguelin.)

A. The construction of the one that broke, on the line shaft?

Q. The engine pulley.

A. The engine pulley is a split pulley with a heavy drop rim.

Q. How was that again? [184]

A. It is a cast iron split pulley with a heavy drop rim.

Q. Sorry, I can't get that last.

A. Drop rim.

Q. Have there been any changes in the safety devices on the governor or the stop since the accident?

A. No, there hasn't; not to my knowledge.

Mr. Kelley: You may inquire.

#### Cross-Examination

By Mr. Paine:

Q. You're the master mechanic; that's your title? A. That's right.

Q. And you have charge of all of this equipment, is that right? A. Yes.

Q. And I believe you made this stop that's on the governor, is that right? Was that made there in the shop? A. It was made in our shop.

Q. And when was it installed?

A. Probably three years ago. That's a guess, of course.

Q. That would be 1944?

A. Probably.

Q. Refreshing your recollection, wasn't it in the summer of 1945?

(Testimony of Fred Beguelin.)

A. Well, it could have been, now. I'm kind of hazy on that. It could have been.

Q. Do you remember the circumstances of how you came to [185] install it?

A. It was recommended by the insurance company.

Q. Recommended by the insurance company that a stop device of this sort be put on?

A. That's right.

Q. And you made it and put it on?

A. That's right.

Q. Now, just step down here just a minute. Then, I believe, did you bolt in and put on this idler pulley too? A. No.

Mr. Kelley: I wonder if the record should show that counsel is directing the witness's attention to Exhibit Number 8?

The Court: Yes.

Q. (Mr. Paine): Was this idler pulley placed on there? A. Not at that time.

Q. Not at that time?

A. No, that was always on there from the time the engine was installed.

Q. Now, I wonder if—maybe this isn't strictly proper cross-examination, Mr. Kelley, but since he made this object he's best qualified to give us a little discussion on how it operates. I wonder if you could explain, Mr. Beguelin, just how this device that you put on the governor operates as a governor stop? [186]

A. Any time that this belt breaks this pulley will go——

(Testimony of Fred Beguelin.)

Q. This is on Exhibit number 8.

A. ———and there's a device on the other side, that's not visible here, that contacts this bar; that bar is hinged right below here, and has a little dog that comes up in behind there that knocks the ratchet off of the automatic stop.

Q. And the arm coming down towards the lower left hand corner of the picture with the weight on it is put there so that when the tension of the belt is taken off the weight falls down in an arc, toward the center of the picture, and that swings the wheel upward, and this little bar that you can see right below the wheel is resting on a sort of a plate out there—would you call it a plate?

A. It's a little pin, that actually doesn't touch it, because this idler is moving, and if it touches, it would kick it out, so it has to be out a little ways.

Q. If it comes up it hits it; it doesn't have to hit it very much?      A. Very little.

Q. And that force is carried up to this device in back of the wheel, and that in turn trips out the spring of the ratchet on the other side?

A. That's right. [187]

Q. And up in back is where it is set, with a set screw holding this little arm into the sleeve into which it fits, is that right?

A. That's right.

Q. What kind of a set screw was put in there?

A. Well, I had the impresion it was an Allen safety set screw. It may have been changed. Mr. Wheeler said it was a square head set screw. It could be.

(Testimony of Fred Beguelin.)

Q. Your impression was when you made it it was an Allen head screw? A. That's right.

Q. That's the type that the head is sort of hollow and you have to put your wrench down in the head to tighten it?

A. That's right, but that may have been changed by somebody because it was too inconvenient; I don't know.

Q. But when you originally put it in it was an Allen type set screw? A. Yes.

Q. And to the best of your recollection was it still that?

A. I don't remember. I didn't look at that set screw, and I wouldn't say whether it was on there or not at the time.

Q. You say one with a head might have been put on to make it easier to set. Do they have to keep setting that set screw? [188]

A. They shouldn't have to, but it's possible, if the engineers didn't always have those kind of wrenches, they might have wanted one with a square head to tighten it or loosen it.

Q. As a rule, it's put in tight and it's supposed to stay tight? A. Yes.

Q. Did you observe this as soon as you came to the plant after the accident?

Mr. Kelley: By "this" what do you mean?

Q. The governor control device, stop device.

A. Yes.

Q. That was about 4:30 in the afternoon?

A. Somewhere around in there.

(Testimony of Fred Beguelin.)

Q. What condition did you find it in?

A. I found out it wasn't tripped when I looked at it.

Q. It was, or it wasn't?

A. It was not tripped.

Q. It was not tripped?

A. Just a minute. You've got me confused. It was tripped.

Q. And you so informed Mr. Black and the officials of the company and the Hartford people, when you got there it was tripped?

A. I believe I told them that at one time.

Q. Now, this test that you made in regard to the device, [189] the Brownell device on the fly-wheel, you say you made that a couple of weeks before the 3rd of July?

A. No, it was quite a while before that, I think.

Q. Oh, I misread this. Two or three months, I think you said.

A. Probably a couple of months.

Q. Two or three months before that would be along in April or May?

A. It would have been April or May, either one of those months.

Q. And you deliberately over-speeded the engine?

A. That's right.

Q. And this Brownell device on the wheel was set to stop the engine at about 250 or 300 revolutions per minute?

A. Yes, whatever would correspond with about 700 feet.



(Testimony of Fred Beguelin.)

Q. Well, I think the testimony is already in that you divide 700 by 2.52. A. That's right.

Q. Which would be somewhere in the neighborhood of 250 to 300 revolutions a minute?

A. That's right.

Q. And you were testing to see if the device tripped at that point? A. Correct.

Q. And when it tripped, then you slowed the engine down and [190] you were satisfied with your tests?

A. We were satisfied that it kicked out and slowed down.

Q. And you didn't let it run on again, even after the butterfly valve had gone into a presumably closed condition, to see whether it would operate after that?

A. Well, on other occasions we've done that. Several times we have let it come to a stop. Generally after we see it kick out that's all we consider necessary.

Q. You stop the engine and go back to your normal operation? A. That's right.

Q. Have you known of instances there where there's been overspeeding, and the butterfly valve has been closed, and still the paper machine was operating?

A. No, I don't know of anything like that. I've heard of it, but I really didn't believe it.

Q. You've heard of it, but you haven't seen it yourself?

A. No. I don't see how it would be possible.

(Testimony of Fred Beguelin.)

Q. But you've heard stories around the plant that that's what occurred?

Mr. Kelley: Oh, I object to what he heard.

The Court: Sustained.

Q. (By Mr. Paine): Now, your suggestion here is that it is possible after this wheel attained considerable speed, that this belt came off and went over and tripped this mechanism? [191]

A. I would say it is possible, yes.

Q. You've never seen or heard of that having happened? That's purely a hypothetical assumption on your part?

A. No, it isn't. Several years ago the belt didn't want to stay on the pulley, and it would go over and knock that out. That's been a good many years ago.

Q. You mean it went over once?

A. I believe it went over over once; once or twice, and struck that trigger.

Q. That trigger is flying around there, of course, at a pretty high rate of speed?

A. The trigger is stationary.

Q. Well, the trigger is stationary, and the wheel is revolving; the trigger doesn't revolve with the wheel?

A. No.

Q. The general condition there of the room around the engine where the number 4 engine was located was pretty well littered up with debris from the twisting, breaking, and line shafting?

A. Yes, it was considerably littered up. In fact, it looked like quite a mess.

(Testimony of Fred Beguelin.)

Q. It was quite a mess; parts had flown all around that room?      A. That's right.

Q. Did you observe the governor belt at that time at all? [192]

A. No. When I came in the governor belt had already been picked up and hung up or laid on a bench there, I believe; I'm not quite sure.

Q. Had you tested this Pickering device that you built at any time previous to the accident?

A. Yes, we did that repeatedly before the accident.

Q. It always worked all right?

A. It always did when I tried it, yes.

Q. When you went there to look at it you expected to find that it had worked, didn't you?

A. That's right.

Q. Did you have anything to do with the removal of the butterfly valve after the accident?

A. Yes.

Q. When was it disassembled or taken out of the line?

A. Well, it wasn't too long after the accident. One of the insurance representatives wanted it removed for observation, and it was taken off for inspection. I wouldn't say just exactly when it was. It was after the accident.

Q. Were you there when it was set up and tested after the accident?      A. Yes.

Q. And at that time it did not shut off the engine, Mr. Wheeler had to shut it off by the throttle, is that [193] right?      A. That's right.

(Testimony of Fred Beguelin.)

Q. And was it then taken into the shop and examined?

A. I don't know; we only had it in the shop once, and I believe that was after we had it in the shop. Now, I wouldn't say.

Q. The first test that was made was just after it was taken out of the line, before it was taken into the shop?

Mr. Kelley: I wonder if counsel would fix the time.

Q. On the 7th of July.

A. That might have been the date, and it was taken out, I know, and taken to the shop and re-installed, and I think that was the only time. It might have been done otherwise that I didn't know anything about.

Q. You think that test that they made on the 7th was the only one, then, that you know about?

The Court: He said "yes." You'll have to speak up by voice.

Q. Did you examine the stuffing when it was taken into the shop? A. Yes.

Q. And was the stuffing binding on the valve stem? A. It was a little tight.

Q. So that it would permit steam to go through; not close [194] tightly?

A. Well, it could be that way.

Q. Well, that's your best recollection, that it was that way? A. Yes.

(Testimony of Fred Beguelin.)

Q. And when it was taken out and tested the steam ran away, and the steam had to be shut down, to stop it?

A. Well, I wouldn't say it was running away. It just wouldn't stop.

Mr. Paine: It wouldn't stop. I think that's all.

Redirect Examination

By Mr. Kelley:

Q. Mr. Beguelin, was the ratchet wheel on the Pickering governor tripped when you saw it late the afternoon of the accident? A. Yes.

Mr. Paine: I think he's already answered that.

Q. The ratchet wheel?

A. That's in direct connection with the entire mechanism. It would have to be.

Q. You saw that the belt was not there, the Pickering governor belt?

A. No, the belt wasn't there.

Q. Counsel has directed your attention to the butterfly valve which you say was taken out for observation. You observed the day of the accident that the pin hadn't [195] been pulled through the eyes of the butterfly valve there, the chain connection?

A. Yes.

Mr. Kelley: That's all.

(Whereupon, there being no further questions, the witness was excused.)



## MYRON W. BLACK

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

## Direct Examination

(Continued)

By Mr. Kelley:

(Whereupon, the reporter read the last question and answer, as follows: "Question: As shown on Exhibit 4, and the engine belt was thrown diagonally across the room, is that it? Answer: Yes, in that direction.")

Q. (By Mr. Kelley): The main belt of the engine pulley that you're referring to, Mr. Black, is shown in plaintiff's Exhibit 4?

A. That's correct.

Q. And after the accident where did you observe that belt to be?

A. The belt was lying, it was pulled away in this direction, and it was lying more this way, north-easterly.

Q. For your information, I believe the record shows that this is the northern half of the line shaft, and that in terms of the picture would be east, and that would be [196] west, and this would be south.

A. Yes; moving in that direction.

Q. Where was the engine pulley itself?

A. Well, the engine pulley was undamaged, in its normal position.

Q. But the driven pulley on the line shaft?

A. It was broken, and the hub of the pulley remained on the shaft.

(Testimony of Myron W. Black.)

Q. By the way, what is the construction of that engine pulley, the engine pulley of the Sumner steam engine?

A. Well, it's a cast iron pulley. Mr. Beguelin testified it was split. I would believe him.

Mr. Paine: I didn't catch that last.

A. Mr. Beguelin testified it was a split pulley.

Q. Is that correct?

A. I'm not in a position to say that it is a split pulley.

Mr. Paine: That's merely a different type of pulley; you didn't mean it was split by the accident?

A. Type of construction.

Q. What are the two types of construction?

A. Solid or split.

Q. What is the difference between the two with reference to their critical speed?

A. Well, a solid pulley has a higher critical speed, normally, than a split pulley. [197]

Q. Have there been any changes in the safety devices on the governor or the stop since the accident?

A. None whatsoever that I'm aware of.

Q. Did you advise the defendant Hartford Insurance Company after the accident that Mr. Wheeler, your stationary engineer, saw that the Pickering governor had never tripped when he examined it shortly after the occurrence of the accident, when he went on shift?

Mr. Paine: I didn't get the first part of that question.

Mr. Kelley: Read the question.

(Testimony of Myron W. Black.)

(Whereupon, the reporter read the last previous question.)

A. Yes.

Q. And in addition, did you advise them by letter of that fact?      A. I believe so, yes.

Q. Do you recall what was the date of that letter?

A. Well, it was after the conference we had in the mill. That I believe was August 4. It was after that date, somewhere, I would say, in August or the first part of September.

Q. Of 1946?      A. Of 1946.

Mr. Kelley: Just for the record, may we request a notice to produce in open court, if your Honor please, that letter from the Inland Empire Paper Company to the Hartford outlining that fact?

Mr. Paine: I think this is probably the one you want, Mr. Kelley.

(Whereupon, letter from Inland Empire Paper Company to Hartford Steam Boiler Inspection & Insurance Company dated August 20, 1946, was marked Plaintiff's Exhibit No. 13 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's exhibit for identification 13, and specifically to the last paragraph thereof, is that the letter you refer to?      A. That's right.

Mr. Kelley: I'll offer the exhibit, specifically as to the last paragraph, on the point.

(Testimony of Myron W. Black.)

The Court: I suppose Mr. Paine had seen it, since he produced it.

Mr. Paine: I produced it, and I have no objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 13 for identification was admitted in evidence.)

PLAINTIFF'S EXHIBIT No. 13

Inland Empire Paper Company, Manufacturers  
Millwood, Wash.

August 20, 1946

Telegraphic Address  
Spokane, Washington.

Hartford Steam Boiler Inspection & Ins. Co.  
707 Artie Building  
Seattle 6, Washington

Attention: Mr. Fred Fullmer

Dear Fred:

When Mr. McKeon was here there was one question left to be answered—that is, what was the condition of the governor after the wreck.

Mr. Coy was the engineer at the time of the wreck. After the wreck he stated he saw that the pin on the butterfly valve was pulled and the butterfly was closed but did not remember the condition of the governor, being too busy with other things to notice.

J. H. Wheeler was Mr. Coy's relief who came in about 2:15 p.m. He stated that when he came in

(Testimony of Myron W. Black.)

he looked at the engines right away. He says the butterfly valve was closed but that the governor had not been tripped. He is very positive in this statement.

This should answer our last question.

Very truly yours,

Inland Empire Paper Company  
Myron W. Black

MWBlack:gm

(Received Seattle Aug. 21 1946 H.S.B.I.&I. Co.)

Mr. Paine: Just a moment, please. I didn't maybe understand Mr. Kelley's offer. Did I understand you to just offer the paragraph of this letter?

Mr. Kelley: I believe that's all, under the rules of evidence, I would be permitted to offer. Would you read it?

The Court: The whole exhibit was offered.

Mr. Kelley: Specifically as to the last paragraph. If it had been a jury I apprehend we would have covered the rest of it up, your Honor. I don't want to be hypertechnical.

Mr. Paine: I think the rest of it is material to the whole sum and substance of the letter, and I would object to the last paragraph going in without the whole letter going in.

Mr. Kelley: I assume the Court will read the whole letter.

The Court: The whole letter will be admitted for what it may be worth.



(Testimony of Myron W. Black.)

Q. (By Mr. Kelley): Now, to your personal knowledge, had the defendant Hartford Insurance Company ever tested this Brownell overspeed stop before the accident?

A. I did not see them test it, but I was told by their representative from time to time when they had tested it.

Q. What representative told you that?

A. Harry Olinger.

Q. And did he tell you how he tested it?

A. Yes, by overspeeding. [200]

Q. Until it tripped? A. Yes.

Q. And was there ever any damage to the machinery or any of it which was damaged as the result of the accident on July 3, 1946, as the result of these previous overspeedings?

A. I'm not sure that I got that question in its entirety.

Mr. Kelley: Would you read it?

(Whereupon, the reporter read the last previous question.)

A. These previous tests had been accomplished without any damage to the machinery that was damaged at the time of this accident.

Q. Speaking of damages, did you on or about September 12, 1946, outline and itemize the nature and extent of the damages which you claimed was covered by the policy and for which you are now suing the defendant?

A. That was itemized in the office, and I passed on it before it was forwarded.

(Testimony of Myron W. Black.)

Q. I should have asked, was this done under your direction and supervision? A. Yes.

Mr. Kelley: Just as a preliminary, may I for the record request a notice to produce in open court that certain memorandum from the Inland Empire Paper Company [201] under date of September 12, 1946, outlining in detail the nature and extent of the damage? It perhaps is unnecessary, but I want to make sure of the point, that it's in the record.

Mr. Paine: I have one here, Mr. Kelley, dated September 17.

Mr. Kelley: I thought it was the 12th. I may have been mistaken.

(Whereupon, letter from Inland Empire Paper Company to Hartford Steam Boiler Insurance Company dated September 17, 1946, with enclosures, was marked Plaintiff's Exhibit No. 14 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's identification number 14, is that the memorandum that you referred to a moment ago, together with your letter of transmittal?

A. Yes, this is the statement.

Mr. Kelley: I'll offer plaintiff's Exhibit 14.

Mr. Paine: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 14 for identification was admitted in evidence [set forth on pages 455 to 464].)

Q. (By Mr. Kelley): What is the maximum speed at which your paper has been run through the number 4 machine?

(Testimony of Myron W. Black.)

A. Normally, the maximum speed—I'd say the maximum is [202] 690. That's the highest I'm aware of that machine having made paper. On newsprint we try to run, did try to run, somewhere between 670 and 690.

Q. By 690 you mean what?

A. Lineal feet per minute.

Q. Which corresponds to an engine speed of the Sumner steam engine of what?

A. Approximately 270.

Q. 270 what? A. R.P.M.

Q. R.P.M. means what?

A. Revolutions per minute.

Q. 690 feet per minute, then, is not quite double the machine was set to operate at the time of the accident?

A. That's right. It was supposed to be operating at 354, I believe, and this speed we're talking of is 690.

Q. What the are facts upon which you conclude that this Sumner steam engine ran away?

A. Well, we had a general wreck, and a general wreck could only have come from overspeed, and the overspeed can only have come from the prime mover, which is the Sumner steam engine.

Q. And the safety devices of that Sumner steam engine are how many?

A. Well, we'll say three, the Pickering governor, and the [203] overspeed, and the hand release.

Q. Well, the hand release is part of the Pickering governor?

A. Well, part of the safety stop, too.

(Testimony of Myron W. Black.)

Q. And directing your attention to Exhibit 8, and particularly this arm appearing therein, that was placed on by your company? A. That was.

Q. With the knowledge and consent and approval of the defendant Hartford Insurance Company? A. At their recommendation.

Q. Did you get specific recommendation from the Hartford Insurance Company in that regard?

A. Yes, there were.

(Whereupon, letter from Hartford Steam Boiler Inspection and Insurance Company to Inland Empire Paper Company dated January 30, 1945, was marked Plaintiff's Exhibit No. 15 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's exhibit for identification number 15, will you state what that is?

A. This is a recommendation that a safety stop such as the one under discussion be placed on this governor, and in case of a belt failure it would stop the engine, a belt breakage.

Q. That bears the date of what, by the way, while we're [204] waiting?

A. January 30, 1945.

(Whereupon, letter from Hartford Steam Boiler Inspection and Insurance Company to Inland Empire Paper Company dated April 25, 1945, was marked Plaintiff's Exhibit No. 16 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's Exhibit for identification 16, will you tell the Court what that is?

(Testimony of Myron W. Black.)

A. This is a similar recommendation for the Sumner Steam engine and a steam engine inspection report, and the recommendation that the safety stop be placed on the Pickering governor.

Q. Who sent it to you?

A. Well, it was forwarded over the name of J. G. Murray, as chief inspector.

Q. Who is J. G. Murray?

A. Signed as chief inspector for the Hartford Steam Boiler and Inspection Company.

Q. Do you know J. G. Murray?      A. I do.

Q. Is he in the court now?      A. He is.

(Whereupon, letter from Hartford Steam Boiler Inspection and Insurance Company to Inland [205] Empire Paper Company dated December 18, 1945, was marked Plaintiff's Exhibit No. 17 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's Exhibit number 17 for identification, what is that?

A. This is an inspection report with the note that the governors of these engines have been equipped with a mechanism which shuts the steam off when the governor belt breaks or runs off.

Q. Bearing date of what?

A. Date of December 18, 1945.

Mr. Kelley: I offer plaintiff's Exhibits 15 to 17 for identification.

Mr. Paine: No objection.

The Court: Identifications 15, 16 and 17 will be admitted.



(Testimony of Myron W. Black.)

(Whereupon, Plaintiff's Exhibits Nos. 15, 16 and 17 for identification were admitted in evidence.)

### PLAINTIFF'S EXHIBIT No. 15

The Hartford Steam Boiler Inspection and Insurance Company, Hartford, Connecticut

Seattle Office

Arctic Building,

Seattle 4, Washington

January 30, 1945

E. G. Watson Manager

J. G. Murray Chief Inspector

#### Report of Inspection

Date of Inspection January 20, 1945. Inspector H. L. Olinger.

Location Assured's Plant, Millwood, Washington.

Brownell Steam Engine No. 6974

Sumner Steam Engine No. 4

Inspected while in operation.

The only means of safety stops on these engines are the independent mechanical operated stop in the fly wheel. In order for this safety stop to operate the engine must overspeed. With only this type of stop should this mechanism fail serious results might follow.

We would recommend that the governors be equipped with safety stops in order to prevent overspeed should the belt or chain break or run off.

(Testimony of Myron W. Black.)

We will appreciate your giving this your careful consideration and these conditions were discussed with Mr. Black, at the time of inspection.

Yours very truly,

J. G. MURRAY,

Chief Inspector.

Form 195 FHF:FM

Original and 1 to M. A.

(To Inland Empire Paper Company, Millwood, Washington.)

(Received Feb. 1-A.M. Answered.)

PLAINTIFF'S EXHIBIT No. 16

The Hartford Steam Boiler Inspection and Insurance Company, Hartford, Connecticut

Seattle Office

Arctic Building,

Seattle 4, Washington

April 25, 1945

E. G. Watson Manager

J. G. Murray Chief Inspector

Report of Inspection

Date of Inspection April 22, 1945, Inspector H. L. Olinger.

Location Assured's Plant, Millwood, Washington.

Steam Engine, Sumner, No. 4

Steam Engine, Brownell, No. 6974

Inspected while at rest.

The only means of a safety stop on these engines are the independent mechanically operated stops in

(Testimony of Myron W. Black.)

the fly wheel. In order for this safety stop to operate the engine must overspeed. With only this type of stop should the mechanism fail, serious results might follow.

We would recommend that the governors of these engines be fitted up that in case the governor belts or chain should break or run off the governor valve will be closed automatically.

The conditions have been reported at a previous inspection and we understand that consideration is now being given to installing such a safety stop.

The conditions outlined were discussed with Mr. Myron Black, at the time of inspection and we understand they will receive proper attention.

Steam Engine, American Ball, No. 5729

Inspected while at rest.

No conditions were observed that require attention at this time.

Yours very truly,

J. G. MURRAY,

Chief Inspector.

(To Inland Empire Paper Company, Millwood, Washington.)

(Received April 26 A.M. Answered.)

Form 195 FHF:FM

(Testimony of Myron W. Black.)

PLAINTIFF'S EXHIBIT No. 17

The Hartford Steam Boiler Inspection and  
Insurance Company, Hartford, Connecticut

Seattle Office

Arctic Building,

Seattle 4, Washington

December 18, 1945

E. G. Watson Manager

J. G. Murray Chief Inspector

Report of Inspection

Date of Inspection December 16, 1945. Inspector  
H. L. Olinger.

Location Assured's Plant, Millwood, Washington.

Brownell Steam Engine No. 6974

Sumner Steam Engine No. 4

Inspected while at rest.

The governors of these engines have recently been  
equipped that the mechanism will shut the steam  
supply off should the governor belt break or run off.  
We appreciate your cooperation in the completion  
of this recommendation.

American Ball Steam Engine No. 5729

Inspected while at rest.

No conditions were observed that require atten-  
tion at this time.

Yours very truly,

J. G. MURRAY

FHF:FB

Chief Inspector.

Original & 1 to M. A.

(To Inland Empire Paper Company, Millwood,  
Washington.)

(Received Dec. 20 A.M. Answered . . . . .)

(Testimony of Myron W. Black.)

Mr. Kelley: You may inquire.

Cross-Examination

By Mr. Paine:

Q. You were down how soon after the accident, into the engine room?

A. It's hard to say. I was in the office of the mill at the time of the accident. One of the boys who saw the accident [206] came in and told me about it, and I went out. I would guess anywhere from five to fifteen minutes.

Q. But everything was over, the engine was stopped, by the time you got there?

A. No, the engine was still running by the time I got there, number 4 engine.

Q. Number 4 engine was still running at the time you got there?      A. Yes.

Q. Idling?

A. Yes, idling at a slow speed.

Q. Was it stopped while you were there, and the steam shut off?      A. Yes.

Q. So the steam being shut off wasn't until 10 or 15, or 5 or 10 minutes afterwards, at any rate?

A. Yes.

Q. What was the condition of the pulley on the line shaft? Was it still wrapped up in the main belt? What was its condition?

A. Well, there was nothing much left of any of the pulleys except the hubs. My memory is that the hub and possibly part of the flange were left on the pulley, but the hub was over to one side from where it would normally run.



(Testimony of Myron W. Black.)

Q. I gather there was not much left of it. Was the rim [207] torn off the hub?

A. A part of the rim was torn off, and maybe all of it; I'm not sure; of this particular pulley?

Q. Yes, of this particular pulley.

A. Some of them were down to nothing but hubs, and some of them were just pieces broken out.

Q. But this particular pulley, part of the rim was off, and some of the spokes, and down pretty well to the hub?

A. Yes, I think that's fairly stated.

Q. And this rubber belt pretty well cut up, or was it in pretty good condition?

A. Which rubber belt, may I inquire?

Q. From the engine to the line shaft.

A. It was somewhat damaged, but not enough that we couldn't put it back on the engine after those repairs were made.

Q. There were tears in it that had to be patched up?

A. There were minor, very minor.

Q. The general condition there was pretty well cluttered up with broken pieces of shafting and pulley and so forth?

A. Well, along the line shaft it was a mess, because the line shaft was twisted and torn and the pulleys were on it. After you got back from it a ways you didn't see so much evidences of damage.

Q. Now, you carried insurance on the engine and on the paper machine, is that right? [208]

A. Well, parts of the paper machine. On the engine and parts of the paper machine.

(Testimony of Myron W. Black.)

Q. The felts, some of those parts, weren't insured?  
A. No.

Mr. Kelley: Thank you, Mr. Paine; would you permit the interruption while I identify the main thing in this lawsuit, the insurance policy?

(Whereupon, policy No. 97-743 and various schedules was marked Plaintiff's Exhibit No. 18 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's exhibit for identification 18, what is that?

A. That's the insurance policy, the Hartford Steam Boiler Inspection and Insurance Company to the Inland Empire Paper Company, showing the different items which were covered by insurance.

Mr. Kelley: I would like to offer this exhibit with the request, if your Honor pleases, that we might stipulate that accurate copies be substituted for it if that should become necessary. I imagine one of the reasons I didn't get around sooner, so many people have been trying to look at it.

The Court: Do you have any objection to that? He's offered it in evidence, first. Do you have any objection to the offer? [209]

Mr. Paine: No objection.

The Court: Are you willing to agree that a copy may be substituted for the original if it becomes necessary or desirable?

(Testimony of Myron W. Black.)

Mr. Paine: I have no objection. I think if he collects on this he won't use it any more. It's expired.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 18 for identification was admitted in evidence.)

[Plaintiff's Exhibit 18 is identical with Exhibit A attached to Complaint and is set forth on pages 9 to 32.]

The Court: All right, proceed with the cross-examination.

Cross-Examination

(Continued)

By Mr. Paine:

Q. Were any of the parts of this broken line driven pulley close to the number 4 engine, in relation to it, near it?

A. Well, I don't remember seeing any parts right around, the parts themselves lying in or around the engine; however, there were evidences of where parts had come through or passed that.

Q. You mean passed by the engine?

A. Yes.

Q. Or gone over beyond it; I think there was some damage to the lubricating pipes of the engine?

A. Well, the crankcase guards were somewhat damaged; the lubricators that lubricated the crank pin were—oh, they had shown some abuse. [210]

Q. Well, as though some object had hit them in passing?

A. Yes.

(Testimony of Myron W. Black.)

Q. Or during this explosion, but which one it was, whether this particular pulley or some other part of the line shaft, you wouldn't know?

A. No.

Q. You can't put them back in place, I presume. Before we get away, maybe, from physical effect, could you tell whether it was the first wire pulley at the end of the line shaft that gave way?

A. I have no way to reach a conclusion on that at all, not being there, and I wouldn't want to conclude anything like that from the wreckage.

Q. Well, did the line shaft show the effect of twisting and turning, as though it had become loosened at the far end and been permitted to swing and turn?

A. Well, it was twisted from one end to the other. Whether it might have started at this end and gone that way, or the other end, or in the middle, it's purely speculative.

Q. If it had started at the engine and broke, that would have released any pull on it? A. Yes.

Q. If it started on the far end, you would have had a whipping effect on the whole line shaft if it continued to be attached to the engine? [211]

A. Yes, but if it bent you wouldn't have stopped the whipping regardless of whether it started in the middle and went this way, or started this way and went that.

Q. These pulleys and so forth on the line shaft, you don't know what speeds they could stand; they

(Testimony of Myron W. Black.)

had never been tested for speed, what they could stand?

A. Only these overspeed tests that had been made by our representative and the insurance representatives both, where they speeded the engines up to above any operating speeds, and the pulleys had always stood those tests.

Q. Up to about 250 revolutions per minute?

A. Well, it is more than that, because we had operated the engine somewhere around 270, and it had withstood that and a little bit more, or it wouldn't have operated without kicking out in normal operation.

Q. Well, those pulleys weren't always at the same condition; sometimes they had some loads on them and sometimes they didn't, isn't that so?

A. Well, in normal operation they're all loaded. In abnormal operation, in case the paper is off the machine or you're washing the machine up or making repairs, certain sections will be down.

Mr. Kelley: I'm sorry, I didn't get that answer.

(Whereupon, the reporter read the answer.)

The Court: That's the load on the pulleys? [212]

A. Yes.

Q. I think before we get the policy in, you had this policy of insurance which covers the number 4 engine and your other engines and paper machines, the main principal parts of the rolls and so forth, but does not cover felts or some of the parts that wear out or break more easily, is that right?

A. That's right.



(Testimony of Myron W. Black.)

Q. And you had no insurance on the line shaft or the line shaft pulleys connected between the paper machines and the engines?

Mr. Kelley: Of course, we're maintaining the damage to the line shaft is a direct result of the damage occurring in the engine. There are various types of insurance. If counsel will indicate what type of underwriting he means, I won't object further. We're maintaining that all the damage here was covered, as a direct result of the engine accident.

Mr. Paine: Well, I want to show they had attached to this engine the uninsured line shaft and the pulleys, which were not covered by insurance covering them only for possible accidental breakage.

Mr. Kelley: Then I'll have the additional objection that Mr. Black is a manager, and not an insurance underwriter, and that calls for expert testimony [213] as to the nature of the question, and also it is a law question for the court.

Mr. Paine: It's merely a question—he's familiar and offered in evidence the insurance policy they offered here; all I'm asking is if they had any insurance on that line shaft, and I think he's in a position to testify.

Mr. Kelley: We've offered the policy; it speaks for itself, and the construction is one for the Court.

The Court: As I understand, he is asking whether they had any other, or had any direct in-

(Testimony of Myron W. Black.)

surance in this company or some other one outside of this policy.

Mr. Kelley: Then we'd get into the question of secondary and primary coverage, and for a third reason the question would be incompetent, irrelevant and immaterial.

The Court: If I understand it, the question goes only to the interest of the witness or possible bias of the witness. It does not concern directly the legal effect of this insurance, isn't that it?

Mr. Paine: That's true.

The Court: I'll overrule the objection, and permit it to come in for that reason.

(Whereupon, the reporter read the last previous question.) [214]

A. That's correct.

Q. (By Mr. Paine): Now, in regard to these recommendations, Exhibits numbers 15, 16 and 17, I show you first number 15; in January the insurance company had recommended to you that you install this safety device to stop the governor in the event that the belt ran off or broke, is that right?

A. That's right.

Q. Prior to that time you had no device of that sort on the governor, and if something happened to the governor belt the governor would permit the engine to speed up; it would no longer have any controlling effect upon the engine, is that right?

A. That's right.

(Testimony of Myron W. Black.)

Q. And that was a common enough occurrence to justify the insistence of putting this device on to prevent that, wasn't it?

A. Let's put that in a different manner, if I may. Before this equipment was put on there, we were dependent upon the overspeed stop stopping the engine in case of a pulley or belt breaking. With a belt breaking here, it's an additional safety.

Q. And I think as that letter points out, the Brownell stops aren't satisfactory and don't operate satisfactorily, and that an additional or independent stop on the [215] governor was felt necessary?

A. Nobody wants to be dependent entirely upon one thing if they can help it.

Q. You get two; and these belts frequently run off the pulleys or break, don't they?

A. Which belts?

Q. The belts from the engine to the governor.

A. They do break.

Q. They do break, wear out and break, is that right? A. They do.

Q. And this was put on there to counteract any effect that that might have if that occurred?

A. That's right.

Q. And you then did put them on sometime in the fall of '45, and I think they were inspected, I think it says "inspected while at rest"; isn't that what the letter says?

Mr. Kelley: Has your Honor had an opportunity to see those exhibits?

The Court: Yes, I've read them.

(Testimony of Myron W. Black.)

Mr. Paine: Well, I think they probably speak for themselves.

The Court: Yes, they speak for themselves.

Q. (By Mr. Paine): Now, Mr. Black, after this affair took place there was quite a bit of discussion amongst you [216] people with the Hartford people as to whether or not the governor safety device had operated to stop the engine, wasn't there?

A. Yes.

Q. And you were making investigations and they were making investigations, and everybody was trying to locate somebody who claimed to have examined it close to the accident, is that right?

Mr. Kelley: I object to the form of the question, "who examined it closed to the accident."

Mr. Paine: Well, who observed it close to the accident, if that's your objection.

The Court: Read the question, will you?

(Whereupon, the reporter read the last previous question.)

The Court: Overrule the objection.

A. You mean close to the time of the accident?

Q. Yes, close to the following of the accident.

A. That's right.

Q. And you learned shortly after the accident that Mr. Beguelin, who testified here today, had observed it in the afternoon after the accident, and had reported that it had tripped and operated?

Mr. Kelley: Now, for the sake of the record, this is improper cross-examination as far as this witness

(Testimony of Myron W. Black.)

was [217] concerned. Mr. Beguelin was here, and he's been cross-examined as to what he knows. This matter wasn't gone into at all with this witness on direct.

Mr. Paine: He's gone into it by putting in evidence this letter which your Honor read, about the only question that was still left open, in August, as to who saw the governor stop and what position it was in.

The Court: Well, I'll overrule the objection.

Mr. Kelley: If it goes to the witness Wheeler I wouldn't have any objection. It doesn't refer to Beguelin.

The Court: Overruled.

Witness: I'd like to have that question, please.

(Whereupon, the reporter read the last previous question.)

A. I don't gather from Mr. Beguelin's testimony that it had tripped and operated. He said that when he saw the Pickering governor it had been tripped. He didn't say how it had been tripped or when it had been tripped.

Q. I think you're correct in that, Mr. Black. I phrased it inadvertently. All he said was that when he saw it it was in tripped condition.

A. That's right.

Q. As to when that tripping occurred or how, of course he didn't know anything but he did know that he did see [218] that and had told you that. That's right, isn't it?



(Testimony of Myron W. Black.)

A. Well, I won't differ with it very much, because we didn't know, and I didn't know, and everybody—as you said, we were looking for facts, and we'll say that the governor at 6 o'clock was tripped; now, when, where and why-for?

Q. That you didn't know, but you had that one fact: Here was a witness that said that at 6 o'clock, or 5 o'clock, sometime that afternoon, the governor was tripped, but you were still looking for somebody, and you finally located Mr. Wheeler, about the latter part of August, when you wrote this letter that Mr. Wheeler said that he had seen it tripped when he came on, or had seen that it had not functioned, and was in a position where it had not closed the valve, at about 2:30 when he came on?

Mr. Kelley: Now, just to clear things up, I object to the disjunctive form of that question. We don't know what he's talking about, the Pickering governor or the butterfly valve.

Mr. Paine: We're talking about the Pickering governor.

Mr. Kelley: Then I think he should state it to witness clearly.

The Court: Do you understand the question?

Witness: No; I'd like to have it read.

The Court: Perhaps you had better reframe it.

Q. (By Mr. Paine): In August, shortly prior to the time you wrote this letter, you then for the first time learned from Mr. Wheeler that he had seen the Pickering governor stop on the governor

(Testimony of Myron W. Black.)

in a position where it hadn't functioned, at about 2:30 in the afternoon of the accident?

A. That's right.

Q. And on that wrote this letter to the effect that that now clears up this question, is that right?

A. That's correct.

Q. Now, had Mr. Janecek at any time prior to your writing of this letter ever told you that he had seen this Pickering stop in a position where it had failed to operate, immediately after the accident?

A. May I get your question? Had he told me that this Pickering governor had been tripped?

Q. Had not been tripped; he testified that when he examined the Pickering governor right after the accident that it had not been tripped.

A. To my knowledge he never told me that, and the attitude of this letter is my attitude.

Q. This was the first information you had that anybody had seen the Pickering governor and could testify as to its condition at an earlier period than Mr. Beguelin had seen it? [220]

A. That's right.

Q. And when, if at all, did Mr. Janecek ever tell you that he had seen it immediately after the accident?

A. Well, he has told me from one time and another that he had seen the governor, but to tell me that he had seen the governor in a tripped condition, no, I don't.

(Testimony of Myron W. Black.)

Q. Well, now, we don't want to misunderstand ourselves. He had seen the governor, but that he hadn't seen it as to whether it had operated or hadn't operated? A. Yes.

Q. That's right? A. That's right.

Q. He never told you up until he testified on the stand the other day that immediately after the accident he examined the governor stop and determined it had not operated at that time?

A. That's right.

Q. So the first news you had of it was the other afternoon in this courtroom? A. That's right.

Q. And when the Hartford people were there in your office with you and Mr. Janecek in August, August 2, I think it was, Mr. McKeon and Mr. Murray and Mr. Fullmer and Mr. Olinger and you were discussing this matter, at that time didn't Mr. Janecek say: "I didn't pay any [221] particular attention to that governor stop"?

A. Well, he may have, but I can't testify one way or the other.

Q. At least, he never spoke up and said he observed that, and it failed to operate, did he?

Mr. Kelley: Well, of course, this is irrelevant and immaterial. So your Honor won't consider that I do even lip service to this sort of cross-examination, I renew my objection.

Mr. Paine: I think I'm entitled to show what Mr. Janecek said at that conference.

The Court: This witness isn't responsible for what Mr. Janecek may have said.

(Testimony of Myron W. Black.)

Mr. Paine: No, but he was present. It may save a lot of time, by putting on four other people to say he kept his month closed and didn't say anything about it, if he says what Mr. Janecek said in that conference.

The Court: As I understand it, he says he doesn't know what Mr. Janecek said.

Witness: I would like to explain my attitude by reading the first paragraph of that letter: "When Mr. McKeon was here there was one question to be answered. That was the condition of the governor after the wreck."

Q. (By Mr. Paine): Yes.

A. And Mr. McKeon was here somewhere, I believe, on the 1st of August. [222]

Q. That's right; it was on the 2nd, at that conference.

A. And that is my recollection, that that was left open at that time, that nobody knew definitely, and then we found Mr. Wheeler that would testify to the fact that it had not been tripped.

Q. But now Mr. Janecek testifies that he did know definitely at that time, and sat in on all of these conferences, and as far as you remember, if he did know that he never gave voice to it to anybody?

Mr. Kelley: I'll object to that as improper cross-examination.

The Court: Well, overrule the objection.

Witness: I can't say that I—I'll come back to this same thing; if he knew that, I'm not aware of him knowing it.



(Testimony of Myron W. Black.)

Q. Did you observe the governor belt or pay any attention to it afterwards, the one that broke?

A. I saw the governor belt lying underneath the governor, and then later after it was brought up for inspection I saw it, and that was cut off.

Q. Was it cut off up in your office, do you remember?

A. Well, it was brought into the office.

Q. It was brought into the office after it was cut off, and do you remember what was done with it then? Did you [223] give it to anybody, or permit anybody to take it?

A. Well, the Hartford representatives had it the last I saw it. That looks very much like the piece that was cut off, except at that time this was a nice clean break with yellow leather; it's darkened; either from the oil absorption or from other contact.

Q. By "this" you meant the broken edge?

A. That's right.

Q. Did you in your investigation contact the various employees to find out if any of them had touched or tampered with the stop on the governor after the accident?

A. Anyone that we thought might have, we asked if they had. The first consideration and policy of the thing was, we had an accident; our first part was to see if anyone was injured. After that was cleared we have to clear ourselves so we can operate. When that's passed we have to repair our damage so we can return to operation. The fixing of the



(Testimony of Myron W. Black.)

responsibility was secondary for the immediate time. The attitude that was sent out was "Leave it alone, leave the wreck alone, around the engine, until the other interested parties, that is, the insurance company, can see for themselves just what has happened." Now, you say that anybody could tamper with it. All the curiosity seekers around there were there. [224] They were instructed to leave it alone, and nobody ever acknowledged that they touched anything.

Q. Were you present when the insurance people of the Hartford conducted some tests on the butterfly valve on the 5th of July?

A. I was present in the mill.

Q. But you weren't down where they were conducting the tests?      A. No.

Mr. Paine: I have no more questions.

### Redirect Examination

By Mr. Kelley:

Q. Mr. Black, I believe you stated in response to counsel's questioning that the one question that had been left open at the time of a meeting August 2 or August 4, at which you were present and some representatives of the insurance company, was the question "Had the Pickering governor tripped"?

A. That's right; that's the statement in the letter.

Q. And that you made investigation and ascertained that Mr. Wheeler had in fact been present

(Testimony of Myron W. Black.)

and had observed within the space of half an hour after the accident that the Pickering governor had not tripped?      A. That's right.

Q. And you notified them immediately?

A. That's right. [225]

Q. At all times did you leave this wreck, as you expressed it, alone until the insurance company could look at it?

A. Well, as the expectations; you'll have to control the whole crew that was around, but the expectation and the orders were leave it alone until it could be inspected.

Q. And did you afford every facility at your command to cooperate with the insurance company in making an investigation of this loss?

A. We tried to do all we could to leave all the evidence in the best position.

Q. And who were the local representatives of the Hartford who investigated the loss at the time? Who was the first man on the scene?

A. As I remember, Mr. Fullmer was.

Q. Mr. F. H. Fullmer?

A. I think so. I may be mistaken.

Q. Is he the Seattle adjuster?

A. He is the Seattle adjuster.

Q. Now, how about Mr. H. C. Olinger; when did he get on the scene?

A. You're asking me something that happened a long time ago. They were there a day or two after it happened.

(Testimony of Myron W. Black.)

Q. They were the first ones there?

A. They were the first ones there.

Q. And did they conduct a thorough investigation? [226]

A. They went through it, I believe, as thoroughly as they knew how.

Q. And how long were they at the plant?

A. Well, off and on for a week or two weeks.

Q. And you permitted them to talk with and interrogate any and all employees that they desired?

A. They had the freedom of the plant.

Q. And after their investigation Mr. Fullmer and Mr. Olinger informed you that the breaking of the governor belt was the proximate cause of the loss and damage to the property?

Mr. Paine: I object to that.

Mr. Kelley: Well, that's preliminary.

The Court: Objection sustained.

Q. (By Mr. Kelley): What, if anything, did Mr. Fullmer and Mr. Olinger tell you as to the proximate cause of the loss?

Mr. Paine: I make the same objection.

The Court: I'll sustain the objection. That necessarily would be an opinion.

Mr. Kelley: Well, your Honor please, it was brought out in cross-examination with reference to these meetings with the representatives of the insurance company, and apparently by some innuendo the inference is sought to be made that cooperation was not had, or [227] that there was some Johnnie-come-lately evidence produced.

(Testimony of Myron W. Black.)

The Court: Well, this giving them the facilities is all right, but not an opinion as to what caused the accident, by some representative of the insurance company.

(Whereupon, letter from Hartford Steam Boiler Inspection and Insurance Company to Inland Empire Paper Company dated October 18, 1946, was marked Plaintiff's Exhibit No. 19 for identification.)

Q. (By Mr. Kelley): Directing your attention to plaintiff's Exhibit 19 for identification, is that a letter that you received on October 18, 1946, from the Hartford Insurance Company?

A. This is a letter addressed to Mr. C. A. Bufton, General Manager, relative to this accident, signed by Mr. Fullmer.

Q. Did it come to your attention?

A. It did.

Q. And was that the first time that—well, I'll offer the letter, first.

Mr. Paine: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 19 for identification was admitted in evidence.)

(Testimony of Myron W. Black.)

PLAINTIFF'S EXHIBIT 19

The Hartford Steam Boiler Inspection and  
Insurance Company, Hartford, Connecticut

Seattle Office

Arctic Building

Seattle 4, Washington

October 18, 1946

E. G. Watson Manager

J. G. Murray Chief Inspection

Inland Empire Paper Company

Millwood, Washington

Attention: C. A. Buckland,  
General Manager

Re: Accident to Line Shaft driven by Sumner  
Steam Engine No. 4, July 3, 1946.

Gentlemen:

The results of the investigation made into the loss which occurred at your plant on July 3, 1946, have been made the subject of a most careful examination by the Officials of our Company who have reached the conclusion that this damage to property did not result from an accident to the insured engine, but rather came from a source which will be found to be in certain machinery which unfortunately is not described in the policy in effect.

It is true that the insured engine suffered some minor damage in the breaking of the governor belt, but we believe that this was incidental to and caused by the failure of the uninsured machinery and that



(Testimony of Myron W. Black.)

the evidence now brought to light does not bear out an earlier report to the effect that the breaking of the governor belt was the proximate cause of the loss and damage to property.

We regret exceedingly that in view of the circumstances surrounding this case that we are left with no alternative other than to deny liability for the loss arising from this accident.

Yours very truly,

F. H. FULLMER,

Adjuster

FHF:FB

(Received Oct. 19 A.M. Answered.....)

Q. (By Mr. Kelley): And on October 18, 1946, or by that [228] letter of October 18, 1946, was that the first time that you were advised that this insurance company was denying liability for the loss and damage? A. Yes.

Q. Directing your attention again to plaintiff's Exhibit 19, do you have in your possession an earlier report to the effect that the breaking of the governor belt was the proximate cause of the loss and damage to the property?

A. I am not aware of a written report to that effect.

Q. Are you aware of an oral report to that effect? A. Oral discussion, yes.

Mr. Kelley: I think that's all.

(Testimony of Myron W. Black.)

Recross-Examination

By Mr. Paine:

Q. Well, up to the time of this letter the whole matter was in the stage of discussion, and the decision reserved as to whether or not the insurance company would assume this liability, isn't that right? A. Yes, it wasn't discussed.

Q. It was discussed, and no conclusion had been reached until the insurance company finally came to a conclusion and so notified you in October, is that right? A. Yes, that's true.

Q. And your first report to them was that the belt had broken and caused the damage; that was the basis of your [229] report, isn't that right?

A. Yes.

Q. It was your theory that the belt broke and caused the damage, and you so reported to the company, that the belt had broken and caused some damage?

A. And it was not denied by the insurance company, therefore it was a standing report.

Q. The insurance company had not gotten around to denying it, therefore it was a standing report?

Mr. Kelley: They hadn't gotten the bill by that time Mr. Paine.

Mr. Paine: That's all.

(Testimony of Myron W. Black.)

Redirect Examination

By Mr. Kelley:

Q. On that point, of the damage, did your company, with the knowledge and consent of the defendant Hartford Insurance Company, call in the Union Iron Works of Spokane to repair the damage?

A. That's right.

Mr. Paine: It seems to me that's immaterial, your Honor.

The Court: I think so. It wouldn't be contended that's a waiver of the right to deny liability, certainly, and the amount is not controverted. I'll sustain the objection.

Mr. Kelley: If your Honor pleases, this fact is admitted [230] by the defendants, I am sure, of paragraph 6 of our complaint, but they seek to admit it without prejudice, as they call it. Now, whether or no it is without prejudice is a legal question for the Court, and I do offer to prove by this witness, if permitted to testify, that he called in the Union Iron Works of Spokane with the knowledge, consent and approval of the defendant Hartford Insurance Company, and that the situation was appraised by the representatives of the Union Iron Works of Spokane, and that with the knowledge, consent and approval of the defendant Hartford Insurance Company the Union Iron Works of Spokane was given an order to make castings and line shaft bearings and other work that was necessary to the equipment under the circum-

stances, and that this was all done with the knowledge, consent and approval of the defendant, who had previously by oral announcements of its representatives Fullmer and Olinger advised this witness that the proximate cause of the damage and loss to the property in question was from the breaking of the governor belt, which fact is further confirmed by the letter in evidence from the defendant Hartford Insurance Company under date of October 18, 1946. That's the formal offer of proof, for the record.

Mr. Paine: I object to it, your Honor. [231]

The Court: The objection will be sustained.

Mr. Kelley: No further questions.

(Whereupon, there being no further questions, the witness was excused.)

The Court: Do you have any further testimony?

Mr. Kelley: Yes, I have one further witness.

The Court: Well, we'll recess for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

HARRY J. MacCAMY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kelley:

Q. Your name is Harry J. MacCamy?

A. Yes, sir.

(Testimony of Harry J. MacCamy.)

Q. Whereabouts do you live, Mr. MacCamy?

A. 2124 West Maxwell, Spokane.

Q. How long have you lived in Spokane?

A. Oh, about 55 or 56 years.

Q. What is your occupation?

A. I am chief engineer and assistant manager for the Union Iron Works.

Q. Where is the Union Iron Works located?

A. The address is 217 East Montgomery avenue.

Q. In Spokane, Washington? [232]

A. Spokane, Washington.

Q. What are the products of the Union Iron Works?

A. Oh, a general line of mining and sawmill machinery, transmission machinery, shafting, pulleys. We do tank work and pipe work. We have a foundry.

Q. How many men do you employ?

A. Oh, approximately 170 or 180.

Q. Of what does your plant consist?

A. Well, we have a machine shop, a foundry, a forge shop, a boiler shop, a pattern shop, ornamental shop, plate shop.

Q. Are you duly licensed to practice as an engineer in the State of Washington? A. Yes, sir.

Q. As to what type of engineer?

A. Both mechanical and structure.

Q. To what engineering societies to you belong?

A. I belong to the American Society of Mechanical Engineers.



(Testimony of Harry J. MacCamy.)

Q. By the way, how long have you been a member of that? A. I think since 1921.

Q. Of what technical school are you a graduate?

A. I'm not a graduate of a technical school. I got my mechanical education through a mechanical engineering course in the International Correspondence School.

Q. What has been your practical experience in engineering? [233]

A. Well, I served a full apprenticeship as a machinist, worked as a journeyman machinist, have had responsible charge of design and general engineering line in our company for the past twenty years.

Q. In that connection, you've had the design of various types of mechanical machinery?

A. Yes, sir.

Q. And transmission machinery?

A. Yes, sir.

Q. And mining machinery? A. Yes, sir.

Q. Mill machinery? A. Yes, sir.

Q. By the way, your company has done work for the Inland Empire Paper Company?

A. Yes, sir.

Q. Did your company assist in the repair of the machinery, the paper machine, the line shaft, and the Sumner steam engine, in the case at bar?

A. Yes, we did.

Q. Just generally, without going unnecessarily into details, what form did your assistance take?

(Testimony of Harry J. MacCamy.)

A. We furnished the line shafting, made the new pulleys, new bearings, sole plates, couplings, and so forth.

Q. You personally have been at the premises of the Inland Empire Paper Company [234] before the accident of July 3, 1946?

A. Yes, sir, many times.

Q. Can you indicate to the Court approximately the degree of your familiarity with the premises and the machinery contained therein?

A. Well, we've done business with the Inland Empire Paper Company for a good many years. I've had occasion to go out there on numerous occasions, and have been, I would daresay, in every part of the plant.

Q. Are you familiar with that Sumner steam engine as shown on Exhibit 8, I believe?

A. In a general way, yes, sir.

Q. And you're familiar with the Pickering governor shown on that same machine there in plaintiff's Exhibit 8?

A. In the same general way, yes.

Q. And you're familiar in a general way with the Brownell overspeed stop as shown, at least partially, in plaintiff's Exhibit 11 and 8 also?

A. Yes, sir.

Q. And you have been in court and heard the testimony the past two days?

A. Yes, sir.

Q. You've been here the entire time, I take it?

A. Yes, sir.

(Testimony of Harry J. MacCamy.)

Q. Well, Mr. MacCamy, without going into all of that testimony, [235] if I can call to your attention a portion of it, at least, assuming the Sumner steam engine as shown on plaintiff's exhibit 8, with a total number of two cylinders, and I believe a rating, a cylinder size, of twelve inches, connected to a main line shaft of approximately 139 or 140 feet, as shown in plaintiff's exhibits 3 and 4, and the Sumner steam engine being connected by a 22-inch rubber belt of an approximate length of 20 foot, centers, that is, from the center of the engine shafting to the center of the main line shafting, and the main line shaft in turn being connected by vertical belting as shown in exhibits 3 and 4 to a portion of the number 4 paper making machine on the first floor, as set forth in exhibit 1, that picture you see on the top end of the easel there, and further assuming that a Pickering governor on the Sumner steam engine was set to maintain a paper speed of 346 feet per minute, and the Brownell over-speed stop was set to permit a paper speed of approximately 700 feet, and further assuming a sudden speed-up in the engine and the main line shaft and the number 4 paper machine to have occurred, which tossed the pulp going through the number 4 paper machine at varying heights estimated by different witnesses as from 3 to 5 feet above the couch roll of the number 4 paper machine, as shown by exhibits 1 and 5, with an [236] attendant speeding up of the machinery, which twisted the basement

(Testimony of Harry J. MacCamy.)

line shaft of that number 4 paper machine from one end to the other, with the result that all couplings on the line shaft were damaged, and the pulleys on the line shaft were all broken, and with the further damage that the bearings supporting this line shaft were damaged, and the tops of two concrete piers supporting the line shaft were broken, and that two driven—well, at least, from the evidence, at least one driven pulley as shown in exhibit 7 on the main floor above this basement line was also broken, and that in addition the belts in the varying sections were also broken, and the whole thing was described by the witness Black as a mess, what in your opinion produced such damage?

A. Well, I would say the overspeeding of the engine.

Q. The run-away speed of the engine?

A. Yes.

Q. By the engine you mean the Sumner steam engine?      A. Yes, sir.

Q. What in your opinion must have happened to the control devices on this engine to have produced such damage?

A. In my opinion they could not have functioned.

Q. By the way, are you familiar with the location of the trigger which operates the Brownell over-speed stop as shown in Exhibit 11? [237]

A. I'm familiar as the testimony described the location. I've seen it, but I don't know exactly where it is.



(Testimony of Harry J. MacCamy.)

Q. Then aside from your personal examination, assuming, then, that the trigger of the Brownell overspeed stop was tripped, was found, at least, in a tripped position after the accident, what could have caused this?

A. Well, in my opinion the loosening of the main drive belt and being more or less unrestrained sideways, it could have hit the trigger, or other flying debris could have hit the trigger.

Q. What do you know regarding the sensitivity of this trigger? A. Nothing, personally.

Q. I see. In your opinion—well, I'll withdraw that. You may inquire.

#### Cross-Examination

By Mr. Paine:

Q. Well, Mr. MacCamy, what you originally assumed there was if the engine overspeeded and the paper machine overspeeded and the line shafting overspeeded, and the materials got broken on it, it was caused by the overspeed of the engine, isn't that right? A. Yes.

Q. Well, that was given to you in your assumption, wasn't it?

A. As I understand it, that was on the assumption that [238] that's what happened.

Q. On the assumption that it overspeeded, you assumed the cause of the damage was overspeeding?

A. Well, I assumed the damage was caused by overspeeding, because the engine is tied directly to the line shaft, the line shaft to the machine; the



(Testimony of Harry J. MacCamy.)

machine or the line shaft couldn't cause overspeeding. If there was overspeeding, the overspeeding must have come from the engine.

Q. That's right, if there was overspeeding, the overspeeding must have come from the engine. Now, in regard to the Brownell stop on the wheel, did you ever hear of them being set off by a piece of belt hitting them at the end of a sequence of events like this?

A. No, I can't say that I have. I said it was possible.

Q. Well, if it is possible, in your opinion it's highly improbable?

A. Well, no, I wouldn't say it was highly improbable, because in my opinion the belt undoubtedly was moving around some.

Q. The belt was moving around some, and this object that it's got to go down here to hit is a pretty small object, isn't it? Just come down here and look at exhibit 11, and tell me what it is the belt has to hit to set this device off. [239]

A. I think it has to hit this little trigger here.

Q. That's the little trigger in about the center?

The Court: Shouldn't that be marked some way?

Mr. Paine: Well, it is the trigger right in the center of picture 11.

Mr. Kelley: I wonder if we could mark that with the letter "T" right underneath it? May I ask the Court's permission to have that marked "T"?

The Court: Yes, all right.

(Testimony of Harry J. MacCamy.)

Mr. Paine: I'm not a very good penman, but maybe I can do it. The "T" with an arrow points to the little trigger device in the center of exhibit 11.

Mr. Kelley: While you have your pen out there, Mr. Paine could you mark the main engine pulley too? Just write the name "pulley" there.

The Court: Who is testifying here, now?

Mr. Paine: Mr. MacCamy.

Q. (By Mr. Paine): What do you want to put on there, "EP" for engine pulley? Which pulley is this, Mr. MacCamy?

A. That's the engine pulley.

Q. Now, when this stop operates without the belt hitting it, what would be evident on it?

A. What is that question again?

Q. When the stop operates without the intervention of some outside influence, such as this belt flying around. [240]

A. This pin goes out through centrifugal force and contacts this trip.

Q. And you don't know whether the pin was out or the pin was in; you haven't been asked to assume anything in regard to that? A. No, I haven't.

Q. All you were asked to assume was whether or not it was possible for a belt or some other object to fly over and hit this trigger?

A. That's as I understood the question.

Q. And that calls for no expert knowledge on anybody's part, does it? It's a mere question of here is something standing out in the air, a question

(Testimony of Harry J. MacCamy.)

anybody could determine, whether or not some other object could hit it?

A. Well, I think a person would have to have some knowledge of the action of the trigger in order to know whether the belt could have possibly tripped it or not. In other words, I don't think you could have asked somebody that didn't even know what the trigger was.

Q. Would it be possible, even if that trigger were tripped, that with the matter that was flying around in this building at the time of the accident, that any effect of the tripping of that trigger would not be carried up to the butterfly weight, if the chain were involved in anything? [241]

A. I didn't get that question.

Q. Would it be possible, under the conditions that existed—this occurred, as you understand, at about the end of the breaking of all this line shafting, even if the trigger were hit by the belt when it came off, the belt might also land on and keep the chain taut, to the butterfly valve, might it not?

A. Well, as I understand the testimony, I don't think there's room for the belt to get very much further away from the pulley. I don't think it could get far enough to hit the chain.

Q. Well, the chain hooks on right here, doesn't it? The chain is right below the trigger?

A. Yes, but it's in behind this arm. It's possible.

Q. Well, there again, it's possible that this belt hit this trigger without operating the butterfly valve, isn't it?

A. That could happen, yes.

(Testimony of Harry J. MacCamy.)

Q. And if the butterfly valve failed to operate, failed to slow the machine down, and was found on tests right afterwards to fail to stop the machine and keep it from running away, and if when the employees pulled the hand pull on the butterfly valve no stopping of the engine had occurred, and if the steam was not shut off, the only device that could slow this machine down and bring it to a stop would be the stop on the Pickering governor valve, is that right? [242]

A. If the butterfly valve didn't close?

Q. Yes, assuming the butterfly valve didn't close sufficiently to stop the engine, and the steam wasn't shut off, then the only device that could stop it would be the device on the Pickering governor?

A. The automatic trip on the Pickering governor.

Q. The automatic trip on the Pickering governor valve would be the device that would stop the engine, is that right?

A. If the butterfly valve didn't close.

Q. If the butterfly valve didn't close tight enough to stop this engine, the only other device that could stop it would be the Pickering governor device?

A. I understood from the testimony that the engine was practically stopped, it was idling.

Q. When?

A. It was just turning, due to the leakage of the steam through the butterfly valve.

(Testimony of Harry J. MacCamy.)

Q. Well, the leaking of steam might come through the Pickering valve stop, too?

A. If it had functioned I don't think it would have.

Q. You think it would have brought it down to an idling speed?

A. Yes, I think it would stop this engine.

Q. They had it set for idling speeds, and if it was set for [243] idling speeds, it would bring it down to idling speeds?

Mr. Kelley: Would your Honor direct counsel to state what he means by "it"?

Q. (By Mr. Paine): The Pickering governor stop; you can set that to either bring it down to an idling speed or bring it down to a full stop, couldn't you?

A. I didn't think you could do that to the automatic stop. You can adjust the Pickering governor so that it controls the speed within a certain range, but if the belt breaks on the governor and the automatic stop functions, it closes the valve on the Pickering governor and shuts off the steam from the engine.

Q. And if there's any leak from that valve it would escape through?

A. In the Pickering valve?

Q. Yes.

A. I doubt if there would be enough to turn the engine over.

Q. Even to keep it idling?



(Testimony of Harry J. MacCamy.)

A. Not even to keep it idling, through that valve. There might be enough leak through the butterfly to keep the engine operating.

Q. Now, if the first pulley, far out on the end of this line shaft, broke and released that line shaft, would you have a twisting effect if the line shaft was still [244] connected down to the engine?

A. If one pulley broke on the line shaft?

Q. Yes, the pulley on the shaft at the far end broke, and you'd have a twisting, turning effect that came on down?

A. Well, you'd have some agitation. I don't know who could say how much effect it would have to throw the line shaft out of balance.

Q. If the line shaft got out of balance, that would have a tendency to twist and turn and throw the pulleys off, slapping them around?

A. I wouldn't say how much tendency it would have; it would depend a good deal on the speed of the line shaft. The faster the shaft is going the more the effect would be.

Q. Were there any of those pulleys there that should have stood the same strain as the flywheel of the engine took?

Mr. Kelley: I wonder if counsel could fix the speed of the flywheel of the engine which he has in mind?

Mr. Paine: Well, the same speed, before breaking up.

Mr. Kelley: Now, again, I ask counsel to indicate the speed of the engine pulley that he has in mind.

(Testimony of Harry J. MacCamy.)

Mr. Paine: Well, it is a purely comparative speed, the speed of the pulleys, whether they were strong enough to stand the same over-speed that the flywheel was. [245]

Mr. Kelley: Well, again I must ask the Court to direct counsel to put a hypothetical speed.

The Court: I think he has a right to ask the witness to make a comparison, whether the line shaft pulleys can stand as much as the engine pulley, if he knows.

Mr. Kelley: He couldn't know, without that information.

Mr. Paine: Well, I think Mr. MacCamy understands.

Witness: Yes; I'm just waiting for the Judge to tell me whether to answer it or not.

The Court: Yes, you may answer it if you can.

Witness: The only way I could answer it is to say that it's considered common practice to limit the speed of split pulleys to a lower speed than for solid pulleys, and a split pulley is a split pulley. If the pulleys on the line shaft were properly designed, which I presume they were, and the pulley on the engine was properly designed, I would say that they should both stand approximately the same rim speed.

Q. And where you find that there's no damage to the engine flywheel, or a portion of the engine stood the overspeed without any trouble to it, and when the line shafting, pulleys, and so forth were broken, what would you say as to whether they were

(Testimony of Harry J. MacCamy.)

operated, or rather, the engine was [246] operated, at a dangerous overspeed for the engine?

Mr. Kelley: I object to that question, because the question does not embody what engine speed counsel has in mind.

Mr. Paine: I'm not interested in the actual speed. It's from those effects; the engine was operating without any damage to it.

The Court: Overrule the objection.

(Whereupon, the reporter read the last previous question.)

Mr. Kelley: And at what time, if your Honor please; these prior tests conducted by the insurance company, or at the time of the accident?

The Court: I think the time of the accident is implied.

Mr. Paine: Yes; you never broke any of the line pulleys testing them.

Witness: I don't know now what you want me to answer; whether the engine pulleys and the line shaft pulleys were traveling at the same speed at the time of the accident?

Q. Well, what I'm getting at is whether the engine was operating within the proper limits of safety, as far as the engine was concerned, at the time.

A. Well, I'd answer that question no. [247]

Q. Why?

A. Well, because I don't think the speed at which the machine had been tested before, as a mat-

(Testimony of Harry J. MacCamy.)

ter of fact, was a critical speed for either the pulleys on the line shaft or the engine.

Q. Well, they had never been tested to the point where anything was allowed to break, you mean?

A. No, but it had been tested to the point where the overspeed stop functioned.

Q. What I'm getting at is from this occurrence itself there was no evidence of overspeed to the engine, the engine wasn't damaged; it would indicate, would it not, that it hadn't exceeded in any way the safe limits of its operation?

A. It would seem that way.

Q. You might have 'most anything attached to the engine, that, put on there, started going at a hundred revolutions a minute, might break it, if it were a weak sister, or something, without any improper overspeeding of the engine as far as the engine itself is concerned?

A. Yes, I think that's true.

Q. And since some of these pulleys were designed to stand a strain as great as the flywheel of the engine, and yet they were broken up, it would look as though that were due to the twisting and turning of the line shaft, and [248] knocking the pulleys around, rather than through disintegration through centrifugal force, wouldn't it?

A. I don't think that question could be answered. I don't see how anybody could tell what caused the pulleys to break.

Q. If you've got two objects, both of which are built to stand the same speed, and this one does not

(Testimony of Harry J. MacCamy.)

break, and this one does break, isn't it logical to assume it is from the twisting of the line shaft and breaking up, rather than from the centrifugal force?

Mr. Kelley: The witness has answered the question.

The Court: Overrule the objection.

A. (Witness): I still think it was due to the excessive speed, that caused the pulleys on the line shaft to break.

Q. You never have conducted any tests on any of this equipment or examined it personally?

A. No.

Q. It's just a purely hypothetical review of the matter? A. That's all.

Q. If the stop on the governor was adjusted to permit the engine to idle, rather than to come to a sudden and complete and jolting stop, then you wouldn't know whether it was that device or the butterfly device that brought the machine down to idling, would you? [249]

A. If they both operated, do you mean?

Q. You wouldn't know which one had operated if the governor stop device was fashioned to permit the engine to come down to an idling speed rather than a complete stop?

A. If it was equipped that way, I wouldn't know.

Q. And it's possible and often customary to equip them that way, rather than slam the engine off to a complete stop, isn't it? A. It may be.



(Testimony of Harry J. MacCamy.)

Q. I mean mechanically, and so forth, it is possible and feasible and proper? A. Yes.

Q. And you don't know what the condition of the automatic stop on the governor was at the Inland Empire Paper Company plant? A. No.

Mr. Paine: I think that's all.

Redirect Examination

By Mr. Kelley:

Q. Mr. MacCamy, would an engine speed of 270 R.P.M., if that is the setting of the Brownell over-speed stop, to permit a paper speed of approximately 700 feet, have been safe for the pulleys on the line shaft? A. In my opinion, yes.

Q. Would an engine speed, say, of 350 R.P.M. have been safe [250] for pulleys on this line shaft?

A. If I understand the size of the pulleys, yes. I believe that would maintain a rim speed on the split pulleys of somewhere around 4800 feet a minute.

Q. In your opinion, would the pulleys on this line shaft have exploded if the control devices of the engine had functioned?

Mr. Paine: Now, I object to that as improper. If the engine had stopped it wouldn't have exploded at that time.

The Court: I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

Mr. Paine: I think he ought to specify which control devices he's talking about.

(Testimony of Harry J. MacCamy.)

Mr. Kelley: I'll put that question, if your Honor pleases, first.

A. I don't think they would, no.

Q. Now, if the Pickering governor control devices had functioned before any of these pulleys reached their critical rim speed, would they have exploded?

A. Not if the governor had stopped it before they reached their critical speed.

Mr. Kelley: That's all. [251]

#### Recross-Examination

By Mr. Paine:

Q. If it had stopped before they got to the critical point they wouldn't have broken, is that right?

A. That's right.

Q. This overspeed is caused by, may be caused by a number of things getting wrong with the governor, isn't that right?

A. Getting wrong with the controls of the engine.

Q. The breaking of the governor belt from the engine to the governor is only one of many things that might set off an overspeed condition, isn't that so?

A. Well, the failure of the governing devices would cause an overspeed condition.

Q. But those can take place without the breaking of the governor belt; that's just one of the things that might happen and cause the overspeed?

A. Oh, yes.

(Testimony of Harry J. MacCamy.)

Q. And if the overspeed had taken place due to the failure of some other portion of the device, and then as the overspeed developed, the governor belt broke, that would set off the trip device and turn off the machine?

Mr. Kelley: I object; there's no evidence of that in the record. Secondly, if it is shown to be a hypothetical question, the proper foundation has not been laid. [252]

(Whereupon, the reporter read the last previous question.)

Q. Then the breaking of the belt would not have been the cause of the overspeed, would it?

Mr. Kelley: He certainly has the vices he accuses me of.

Q. (By Mr. Paine): No, the question is, if something else goes wrong in the governing mechanism, other than the breaking of the belt.

A. I think that's true.

Q. And nobody having seen what took place there, nobody knows when the governor belt broke, whether first, middle, or last, do they?

A. Well, am I supposed to answer that according to the testimony?

Q. Well, maybe that is involving the testimony. That you wouldn't know.

A. As I understood the testimony somebody testified that they saw the automatic stop on the governor immediately after the accident and it had not acted.

(Testimony of Harry J. MacCamy.)

Q. Yes, there's some testimony that they had seen the stop after the accident.

The Court: I think we'd better start again.

Mr. Kelley: Your Honor understands my apparently haphazard failure to protect the record is due, in part, [253] to the absence of a jury?

The Court: Yes, I understand that.

Q. (By Mr. Paine): What I'm getting at, nobody was present and saw the belt break?

A. Not to my knowledge.

Q. And assuming that is correct, the overspeed might have occurred from another defect in the governor, and the belt may have broken after the overspeed was present, whether it tripped the operating device or didn't trip it?

A. That may be possible.

Mr. Paine: I think that's all.

The Court: Is that all, Mr. Kelley?

Mr. Kelley: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Paine: I'm going to suggest, your Honor please, I might be able to save quite a bit of time; there's been a great deal of evidence come in today that's rather cumulative of evidence I was prepared to put in. I think we can finish our evidence by two or three o'clock tomorrow. A great deal of what I thought might be necessary I think has been eliminated by the testimony of Mr. Kelley's witnesses, and I think if I could check with them I could eliminate a good deal of [254] that.

The Court: Well, Mr. Kelley hasn't rested yet.

Mr. Paine: Oh, pardon me; he told me he had one more witness.

The Court: I expected he would rest, but he hasn't yet.

Mr. Paine: Well, he told me this was his last witness.

Mr. Kelley: I believe all the exhibits from 1 to 19 have been admitted, your Honor?

The Court: I haven't checked back over my notes, but that's my impression. Is that correct?

The Clerk: That's correct, yes, sir.

Mr. Kelley: 1 to 19 inclusive, excepting 12.

The Court: Well, all of the plaintiff's identifications have been admitted.

Mr. Kelley: Well, the plaintiff rests, then. Your Honor, I don't want to impose upon the Court or counsel. As your Honor will observe, Mr. Edge has been after me. We have a jury case set for Monday morning, and if counsel is in a position to make his opening statement, I would like at least to have that.

Mr. Paine: Well, the plaintiff having rested, comes now the defendant at this time and moves the Court for a non-suit or for a judgment in its favor on the [255] ground that the plaintiff has failed to sustain the burden of proof to show that they are entitled to recover under this policy, in that they failed to show that the damage they're seeking to recover here was directly caused by any accidental



breaking of any portion of an insured object directly under the terms of the policy. I thought possibly, this being a non-jury case, that it might be preferable to reserve your Honor's ruling on that motion, put it in for the sake of the record and argue it in full when all of the testimony is in, but I don't know just what your Honor's position in that regard would be. I would like to argue fairly extensively when we argue the entire matter, if it would be convenient to do it that way. If you feel it should be argued before we put in our case, I'd want an hour or two to argue it.

The Court: Well, I see no necessity in a non-jury case having two extensive arguments here. If there's no objection, I'll take the motion under advisement until the evidence is all in, and you can argue the whole thing out at once. I might say that it's been my policy not to grant motions for non suit at the close of the plaintiff's case unless there's a clear failure of proof, because I think it is advantageous, when a case is appealed, that it be appealed only once rather than twice [256] and the Circuit Court of Appeals has, I think, indicated if there is any doubt about it, they prefer to have the whole of the record, and both sides of it, when it comes up there, and for that reason I would be inclined to deny your motion, I'll say frankly, if there was any evidence at all to sustain the plaintiff's claim, but I see no reason why I shouldn't take the motion under advisement. Have you any objection to that, Mr. Kelley?

Mr. Kelley: No; I neither affirm nor disaffirm.

The Court: I won't ask you to do so. Then I'll take your motion under advisement. We'll have one argument, then, not two, however, at the conclusion of the case.

Mr. Paine: That was my thought, but I did want to make an argument based upon the evidence as a whole, and the evidence as introduced, and the burden that was upon the plaintiff to sustain.

Mr. Kelley: Your Honor understands our position, that the motion, if made now or at any time, should be peremptorily denied?

The Court: Yes, I understand you're resisting the motion. Are you ready to proceed with the opening statement?

Mr. Paine: Yes. The opening statement will be brief. I think your Honor is fairly familiar with the general facts and circumstances. We have testimony to introduce by Mr. Olinger, Mr. Fullmer, Mr. McKeon and Mr. Vandereb of conditions that they ascertained when they went to the plant on the 5th of July, after the accident, when Mr. Olinger went there, the tests he made on the Pickering governor stop with Mr. Janecek, which has really been covered already, that governor stop operated four or five times without any interference; that later when Mr. Fullmer arrived the tests were made upon the butterfly valve, the machine was put in operation, and the result of those tests showed the butterfly valve failed to stop the machine, the machine ran away and had to be stopped by the application of

the throttle; the valve was disassembled and examined and found to be in poor condition, and unable to completely close or shut off the steam. There will be some contradictory testimony, or some testimony, which I say I think I can eliminate a good deal of, in regard to these conversations between Mr. Black and Mr. Janecek and what was said by the people there; then testimony by an expert witness in regard to the operation of these types of steam engines, and the causes of overspeed, what must have caused the overspeed, what must have caused the engine to stop, and conclusions from that that the mere breaking of this governor belt occurred not at the [258] inception of this chain of events but was one of the concluding events, and actually brought the stop into operation and stopped the engine. There will be legal questions involved as to the question of the proximate cause; was the breaking of the governor belt, if it occurred at the beginning, or was it the intervening causes after the failure of the governor stop, and for whose failure we would not be responsible; but our testimony will be, as I see it now, quite brief, and I think we can be through by the middle of tomorrow afternoon with it.

The Court: Very well, then. The Court will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 4:15 o'clock p.m., the Court took a recess in this cause until Thursday, October 9, 1947, at 10 o'clock a.m.)

Spokane, Washington, October 9, 1947

10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

HARRY L. OLINGER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Paine:

Q. Will you state your name to the Court?

A. Harry L. Olinger. [259]

Q. And where do you live, Mr. Olinger?

A. 1124 East 16th, Spokane.

Q. And where are you employed?

A. By the Hartford Steam Boiler Inspection and Insurance Company.

Q. In what capacity?

A. As an inspector.

Q. Inspector? A. Inspector, yes.

Q. How long have you been with the Hartford Steam Boiler Insurance Company?

A. Since 1943.

Q. And what was the type of your employment and previous experience before going to them? A. I beg your pardon?

Q. What was the type of your employment and previous experience before going to them?

A. Well, I worked as an inspector for a short time with another company, and stationary engineering, and machinist.

(Testimony of Harry L. Olinger.)

Q. Have you worked with various companies here in Spokane as a stationary engineer and machinist?

A. Yes, I have. I worked for the Golden Age Brewery as an operating engineer, and the Continental Baking Company in the same capacity, and the Davenport Hotel as an [260] operating engineer, and also for the Great Northern Railway Company as a machinist.

Q. When did you first inspect or become familiar with the Inland Empire Paper Company's plant?

A. Well, I think I was out to their plant sometime in 1943, my first visit there.

Q. In what capacity?

A. As an inspector.

Q. For the Hartford? A. That's right.

Q. Now, did you in the spring of 1945 or early winter of 1945 make any recommendations to them in regard to the installation of an automatic safety stop on the governor?

A. Of number 4 engine?

Q. Yes, of the number 4 engine.

A. Yes, I did.

Q. What was your recommendation?

A. Well, I recommended that the Pickering governor be equipped with some kind of a device to shut the steam off or close the governor valve in case the belt should break or run off.

Q. Why was that done?



(Testimony of Harry L. Olinger.)

A. Well, usually this type of governor has such a device on it, and this one didn't.

Q. Well, is it or isn't it a fairly common occurrence for [261] the belt to break or run off?

A. Well, that's a very common occurrence.

Q. And were your recommendations complied with?      A. Yes, they were.

Q. And did you inspect the device after it was installed?

A. Yes, I believe I was out there after that was put on, shortly.

Q. And was it at that time in good operating condition, or otherwise?

A. It appeared to be.

Q. Now, had you previously inspected the plant, and if so, about how often were your inspections?

A. Well, we usually make two inspections a year on objects, engines, of this kind.

Q. When was the last one that you made prior to this occurrence?

Mr. Kelley: Prior to what?

Q. Prior to the occurrence on July 3.

A. Well, as I recall, that was in December, 1945.

Q. There's some testimony, I think, Mr. Olinger, that you had overspeeded the engine, number 4 engine, in testing the butterfly valve; and what are the facts in regard to that?

A. I never overspeeded this particular engine myself.

(Testimony of Harry L. Olinger.)

Q. What sort of inspection did you make of the butterfly [262] valve?

Mr. Kelley: At what time, if your Honor pleases?

Q. In December of '45.

A. Well, as I recall, it was a Sunday that I was out there, a time when the engine was down, and we took the belt off and just tripped it manually.

Q. No, I'm talking about the butterfly.

A. Oh, the butterfly stop; I never tested that; I never overspeeded the engine.

Q. Did you look at it to see whether the proper chains were connected to it? A. Oh, yes.

Q. The weight was on it, and the valves would close if they were released?

A. I've examined that part of it.

Q. Now, getting down to the time of this occurrence that's involved here, when did you first learn of it? A. The third—no, the fourth of July.

Q. The fourth of July; and how did you hear of it at that time?

A. Well, they called me from the Seattle office.

Q. Said that something had happened?

A. Something had happened out there, and they wasn't quite sure what took place.

Q. Go out and take a look at it? [263]

A. That's right.

Q. When did you get out to the plant, then?

A. On the 5th.

Q. And about what time?

(Testimony of Harry L. Olinger.)

A. Oh, that was about—oh, somewhere around between 2 o'clock and 2:30, I'd say.

Q. And where did you go to report, or come in contact with any official of the plant?

A. Well, there was no one in the office at that time, so I immediately went down to the engine room in the basement.

Q. And who was down there?

A. Well, there was a lot of people down there, but I remember seeing Mr. Janecek.

Mr. Kelley: Will you keep your voice up, please?

A. Did you hear that?

Mr. Kelley: I heard the cough, yes, sir.

Q. (By Mr. Paine): Speak up, Harry. We're all a little deaf here. If you shout too much the Judge will stop you.

A. Mr. Janecek was really the only person that I noticed, although there were a lot of other people down there.

Q. That's Mr. Janecek, the superintendent, who has already testified?

A. The superintendent of the paper mill, yes, sir.

Q. What did you do then, after you had seen Mr. Janecek?

A. Well, naturally, the first thing I wanted to take a look [264] at was the safety stops on the engine, to see whether or not they had functioned. I found that they both had tripped.

(Testimony of Harry L. Olinger.)

Q. Now, which one did you go to first?

A. Well, you can pretty near look at both of them at the same time.

Q. They're fairly close together?

A. They're pretty close together, but I think I looked at the Pickering stop first.

Q. And you say—what was its condition?

A. It had been tripped.

Q. What did you do in connection with it, you and Mr. Janecek?

A. Well, I looked at it, you might say, by myself first. Mr. Janecek was standing close by, so I called to him and he came over and we started in to test this thing by hand, re-set it, hold the idler pulley up in position.

Q. Now, when you say test it by hand, you mean that you hold this idler pulley up by your hand instead of its being held up by the belt?

A. That's right.

Q. And then what do you do while you're standing there holding the idler pulley up?

A. Well, you let this idler pulley fall by its own weight.

Q. If you just take your hand away from it, what does it do? [265]

A. Gravity pulls it down.

Q. And is that the same effect it has when the belt is removed from it? A. I think so.

Q. And what happened when you did that?

A. Well, that releases the ratchet coil and lets the spring unwind and place the valve in a closed position.

(Testimony of Harry L. Olinger.)

Q. Did it do that? A. Yes, it did.

Q. About how many times did you and Mr. Janecek operate it?

A. Oh, three, four, five, six times, something like that.

The Court: What time was this? I didn't get that; what was the time?

A. Well, I arrived at the plant that afternoon somewhere between 2 and 2:30.

The Court: That's the 5th of July?

A. That's the 5th of July, in the afternoon.

Q. (By Mr. Paine): Well, you tried it four or five times, you say?

A. Something like that.

Q. And what did it do each time? Did it fail any time? A. It tripped out every time.

Q. It tripped out every time; then what examination did you make of the Brownell butterfly top, or the butterfly stop? [266]

A. Well, we re-set that, and then we had—I don't remember who it was, that went upstairs and pulled this pin.

Q. Somebody went upstairs and pulled the pin?

A. The trip cord on this pin.

Q. And what was the effect of that?

A. Well, that let the butterfly valve, the weight on the butterfly valve, apparently in a closed position.

Q. You didn't, of course, go inside of the butterfly valve; all you could see was what happened on the outside?



(Testimony of Harry L. Olinger.)

A. All you could see was from the outside.

Q. Now, did you take a look at the Brownell trigger mechanism?

A. Yes, we looked at that.

Q. And what condition was that in?

A. Well, it looked all right.

Q. I mean, was the trigger—had it operated? Was it up, or down, this little trigger down here, shown on exhibit 11, had it been in an operated condition? A. Well, yes, it had.

Q. Now, what was the general appearance of the place at that time?

A. Well, there was a lot of confusion around there, as I recall; there was a lot of men down there working, and there was parts of pulleys and line shafting around there; I guess some of it was removed by that time. [267]

Q. There had been some cleaning up done?

A. That's right.

Q. What did Mr. Janecek say to you, if anything, when you and he were inspecting the Pickering stop, as to whether or not it had or hadn't worked, after the accident?

A. Well, of course I can't recall all the conversation that took place, but I do remember asking him who saw that thing first, and he told me that he did. I asked him what he saw, if he saw this thing was tripped. Well, he said he was so busy that he didn't have much time to look at that; a lot of things on his mind.

(Testimony of Harry L. Olinger.)

Q. Made no claim to you at that time that he had discovered it hadn't tripped, right after the accident? A. No, he didn't.

Q. Did you examine the engine itself, the number 4 engine?

A. Well, after we set these stops and tried those, why, I kind of took a general look around there at the wreckage, and went upstairs. I heard there was some damage upstairs. I went up there, just kind of surveyed the thing in general.

Q. Well, I mean did you give any particular attention to the engine and the wheel of the engine as to any evidence of damage or overspeeding to the driving wheel of the engine?

A. Well, as I recall, not at that particular time. I did [268] later.

Q. You did later; what did you discover, if anything, in that regard?

Mr. Kelley: I wonder if counsel will fix the time and place?

Q. When later did you do that?

A. Well, that was on the same afternoon.

Q. The same afternoon; I can't try to follow your every footstep; the same afternoon?

A. It was the same afternoon, of the 5th.

Q. And what did that examination and inspection reveal?

A. Well, at that time there didn't seem to be anything wrong with the engine outside of a few dented guards and broken pipes, oil lubricator pipes, I guess.

(Testimony of Harry L. Olinger.)

Q. There were some dented or broken lubricating pipes?

A. Yes. The main belt looked like it had a few small tears in it.

Q. How big were those tears in the main belt, do you know?

A. Oh, there wasn't anything serious. I remember they patched up the belt later, they drove some nails in it.

Q. Where are these lubricating pipes? Are they up on the top part of the engine, or where are they?

A. Well, yes, they were running over to the crank pins, I believe.

Q. What type of damage did they seem to have suffered? [269]

A. Oh, it just bent them, knocked them out of position, perhaps.

Q. Looked as though something had hit them, knocked them, bent them, that sort of thing?

A. Well, could have been.

Q. What type of wheel was this engine driving, do you remember?

A. Well, this engine had two wheels; the belt wheel on the engine, as I recall, was a split type wheel.

Q. A split type wheel; just explain to the Court what is meant by a split type wheel.

A. Well, it's a wheel that's in two halves, that are bolted together.

Q. That is, it's cast, and then the two halves are bolted together?

A. That's right.

(Testimony of Harry L. Olinger.)

Q. At opposite points on the circumference of the wheel?

A. Bolted together at the hub and also at the rim.

The Court: The rim isn't in two sections, however, is it?

A. Well, the pulley is in two halves; there's a bolt connection at each side, one on each side of the hub, opposite each other.

The Court: Perhaps I don't understand. I thought a split wheel was the center was in two sections, but the [270] rim, on which the belt runs, was continuous.

A. Like this is the wheel, it would be split right through the center.

The Court: Including the rim?

A. The wheel would be lying flatwise, and the hub in the center, and just like you split that through the center; is that clear?

The Court: Yes; including the rim?

A. Including the rim.

Q. (By Mr. Paine): These two portions of the rim are brought tightly together and held there by bolts, is that it? A. That's right.

Q. Now, did you come back to the governor stop at some time later, after you had been there first with Mr. Janecek?

A. Well, yes, after we tested this thing, these stops, why, as I said before, I kind of surveyed the damage around there, upstairs and downstairs, and I kept thinking about these governors, won-

(Testimony of Harry L. Olinger.)

dering what happened, and by that time the engineer was there.

Q. Mr. Wheeler?

A. Mr. Wheeler, and of course, naturally, I started talking to him, and I said to him "I can't understand what happened." Well, he says "I'll show you what happened." He came over and we re-set this Pickering governor stop [271] again, just the same as Mr. Janecek and I had done previously, and dropped the idler pulley, and we couldn't get it to work.

Q. At that time, half an hour later, it wouldn't work at all? A. That's right.

Q. How many times did you and Mr. Wheeler try it?

A. Oh, that's hard to say, but several times, maybe four or five times, three or four times.

Q. And in none of these operations would it work? A. No.

Q. Could you tell apparently what was causing it to fail to work?

A. Well, no, I couldn't.

Q. You couldn't figure out why it wouldn't work?

A. I couldn't figure out what was the matter with it right then.

Q. Now, did Mr. Wheeler say anything to you at that time as to when he had first seen the stop after the accident, or the condition of it after the accident? A. No, he didn't.



(Testimony of Harry L. Olinger.)

Q. Now, when did you go back, or did you do anything further that afternoon of the 5th?

A. Well, after Mr. Wheeler and I tested that, and was looking around there, I still kept thinking about this [272] governor, and wondering what was the matter, so I went back myself, alone, and started to re-set this and test it myself, and I couldn't get it to trip either.

Q. You couldn't get it working? A. No.

Q. When did Mr. Fullmer arrive?

A. Well, Mr. Fullmer came, I went to meet him out at the airport, and I think it was around, somewhere, maybe 6 or 7 o'clock, and we went and ate dinner, and then we went out to the plant after that.

Q. Who, by the way, is Mr. Fullmer?

A. Mr. Fullmer is the adjuster for the Seattle department of our company.

Q. For the office in Seattle?

A. That's right.

Q. And is that the office out of which you were, or under which you were?

A. I'm under the supervision of the Seattle department, the Seattle office.

Q. So Mr. Fullmer was really your superior, in a way, in that regard? A. That's right.

Q. And did you tell him what you had seen and done at that time, and turn the investigation over to him? A. Yes, I did. [273]

Q. Now, you were present out there several times after that, however? A. That's right.

(Testimony of Harry L. Olinger.)

Q. Were you there at any time alone, or on your own, so to speak?

A. Oh, I was there a number of times by myself after; this was a month or so later.

Q. Now, were you there, were some tests conducted after Mr. Fullmer got there, the next morning?

A. Yes, Mr. Fullmer and I went out together.

Mr. Kelley: The next morning, on July 6?

Q. July 6; and was any of the other Hartford men there at that time?

A. No, I think Mr. Fullmer was——

Q. Well, I'll call your attention; was Mr. Murray there?

A. I don't think Mr. Murray came until Sunday, as I recall.

Q. Sunday the 6th, or 7th?

A. That would be the 7th.

Q. Well, now, do you remember which day it was, then, you all tested this butterfly valve?

A. Well, I believe that was Sunday.

Q. What date was Sunday?

A. Sunday would be the 7th.

Q. And you were present during those tests?

A. Well, I was there, but I wasn't right there when the—— [274]

Q. You weren't conducting them? A. No.

Q. That was up to Mr. Fullmer and Mr. Murray? A. That's right.

Q. Did you ever have any conversations with Mr. Wheeler about the operation of the paper

(Testimony of Harry L. Olinger.)

machines when the butterfly valve was closed, had been closed previously, conversation on the 6th of July with him about it?

Mr. Kelley: Oh, I'd have to object to that. It's incompetent, immaterial, it's hearsay; it wouldn't be binding on the plaintiff if it were material, conversations that he might have had.

Mr. Paine: I think Mr. Wheeler was asked about it.

The Court: I don't recall specifically all these conversations, but isn't this one he was asked about on his cross-examination? Overrule the objection.

Mr. Kelley: Well, it was objectionable at the time of cross-examination, but I didn't object.

The Court: What?

Mr. Kelley: I'm objecting now for the record. There has to be an end, I would think, to it some place, this type of testimony.

The Court: Well, I don't believe it is collateral; I think it would be a proper impeaching question; I'll [275] overrule the objection.

A. (Witness): State the question, will you?

(Whereupon, the reporter read the last previous question.)

A. Well, I wouldn't say what date it was, but I remember Mr. Wheeler saying, remarking, one time, that they had made paper for several hours with this butterfly valve in a closed position.

Mr. Paine: You may inquire.

(Testimony of Harry L. Olinger.)

Cross-Examination

By Mr. Kelley:

Q. Are you still the local inspector for the Hartford Insurance Company here in Spokane?

A. Yes.

Q. As I understand, you've been an inspector for them since 1942? A. 1943.

Q. And you mentioned that you had been an inspector a short time before that for another company? A. That's right.

Q. What company was that?

A. That was the General Casualty Company.

Q. General Casualty?

A. General Insurance Company of America.

Q. With head offices in Seattle?

A. That's right. [276]

Q. And what was the nature of your position with them?

A. Well, it was practically the same type of work.

Q. Inspection of engines?

A. Inspector of equipment, boilers, machinery, pressure vessels.

Q. How long were you with them?

A. Oh, I would say approximately six to eight months.

Q. And did you ever hold any other position as inspector of this type of equipment for any other company? A. No, I never did.

Q. And in addition to being an inspector you also have worked as a stationary engineer?

A. Yes, sir.

(Testimony of Harry L. Olinger.)

Q. You followed that occupation how long?

A. Oh, seven or eight years.

Q. And during that time you worked for the Golden Age Brewery and the Davenport Hotel?

A. And the Continental Baking Company.

Q. Continental Baking Company; now, the first time that you went out to the Inland Empire Paper plant was in 1943?

A. Yes. I started to work for the company in 1943, and it was sometime during that year that I made my first visit there.

Q. And at that time—that was in '43?

A. That I first went out there, yes. [277]

Q. And at that time the Inland Empire Paper Company was carrying engine insurance with your employer, the Hartford Steam Boiler?

A. That's right.

Q. And during the year 1944 and 1945 you had the same position with the Hartford?

A. Yes.

Q. The defendant in this case; and you would call at the Inland Empire Paper Company's plant how often during '44 and '45?

A. Well, of course, we had other equipment out there that I inspected, such as boilers, a track locomotive, and sometimes I may not go out for several weeks, and then I might get out maybe a couple of times a week. It's hard to say just how many times I was out there.

Q. In other words, you would go out at least 40 or 50 times during the year?

A. Well, it wouldn't be that many.



(Testimony of Harry L. Olinger.)

Q. Well, how much would it be?

A. Well, they had five boilers out there that we inspected twice a year. I would probably go out maybe 10 to 12 times, approximately. I don't know.

Q. 10 or 12 times a year?

A. That's just a guess.

Q. You might have gone out twice that much, as far as you [278] know; you don't recall?

A. It's possible.

Q. And you mentioned a moment ago that the Inland Empire Paper Company during '44 and '45 had other machinery covered by insurance, and you were familiar in a general way with this policy, exhibit 18, as to the nature and type of the coverage, I presume?

A. Of course, I—an inspector does not know much about the coverage.

Q. I understand; I said in a general way.

A. Oh, I had a general idea.

Q. You knew they had a total coverage there of some \$50,000.00, didn't you?

A. Insurance limits of \$50,000.00.

Mr. Paine: I don't quite see the materiality of this.

Q. (By Mr. Kelley): In any event, you called at least a dozen to a couple of dozen times a year at the plant, didn't you?

A. Well, now, that's just a kind of a rough estimate on my part. I called when it was time to inspect them, or approximately.

(Testimony of Harry L. Olinger.)

Q. Now, what about the time to inspect this Sumner steam engine; how often did you do that?

A. Well, we plan on making two inspections a year on engines. [279]

Q. On the engines; and then you stated you would make, you made, certain recommendations regarding the Pickering governor on the Sumner steam engine?

A. Yes.

Q. And when you were out at the plant some short time before January 30, 1945, you observed that the only means of safety stop on the Sumner steam engine was the independent mechanical operated stop on the flywheel, did you not?

A. That's right.

Q. Referred to here as the Brownell overspeed stop?

A. That's right.

Q. And you realized that if the belt on the Pickering governor, as shown here on exhibit 8, were to break, that a very serious situation would be created with respect to the run-away speed of the engine?

A. What belt are you talking about, now?

Q. This belt right here.

A. Oh, yes, that's the governor belt.

Q. Yes. Would you read the question, Mr. Taylor?

(Whereupon, the reporter read the last previous question.)

A. Those belts often break.

(Testimony of Harry L. Olinger.)

Q. I wonder if you'd just answer the question, Mr. Olinger? You can have a chair, where you'd be more comfortable. [280]

A. State that question again, will you please?

(Whereupon, the reporter again read the last previous question, as follows: "And you realized that if the belt on the **Pickering governor**, as shown here on exhibit 8, were to break, that a very serious situation would be created with respect to the run-away speed of the engine?")

A. That's very, very true.

Q. Yes; and you relayed this information to your superiors over in Seattle, and to Mr. J. G. Murray, the chief inspector, in particular, did you not?

A. They were notified of it at the proper time.

Q. Yes, and pursuant to that notification by you, the Hartford wrote a letter, as shown in plaintiff's exhibit 15, to the Inland, which embodied in part your recommendations, isn't that correct?

A. That's customary.

Q. Well, that's correct, isn't it?

A. That's right.

Q. Now, before that any automatic stop would be put on the Pickering governor, the only other precaution would be the Brownell overspeed stop; that's correct, isn't it?

Mr. Paine: You mean independently operated?

Mr. Kelley: Would you read the question?

(Whereupon, the reporter read the last previous [281] question.)

(Testimony of Harry L. Olinger.)

A. That's right, in connection with the pull chain.

Q. (By Mr. Kelley): In other words, the only means of a safety stop on those engines were the independent, mechanically operated stop on the fly-wheel; that's correct, isn't it? A. That's right.

The Court: You're talking about automatic devices, I presume?

Q. Yes, automatic devices. Now, in order for that automatic device, that safety stop, to operate, the engine itself had to overspeed, isn't that correct?

A. That's true.

Q. And with only this type of stop, should that mechanism fail, very serious results would follow, as you have indicated? A. That's right.

Q. That's correct, so you recommended that the governor of the number 4 engine be fitted up in case the governor belt or chain should break or run off? A. That's right.

Q. So that the governor valve would be closed automatically? Answer so the reporter will get it.

A. Yes, that's right.

Q. And you discussed and outlined that situation with Mr. Myron Black at the time of another inspection of April 22, 1945, [282] did you not?

A. No doubt I did.

Q. Well, to refresh your recollection, directing your attention to plaintiff's exhibit number 16, you recall that? A. Oh, yes.

Q. Yes, and that's the fact, isn't it?

A. That's right.

(Testimony of Harry L. Olinger.)

Q. Then pursuant to that time the governor of the number 4 Sumner steam engine with respect to the Pickering governor was equipped with a mechanism that would shut off the steam supply should the governor belt break or run off? A. It was.

Q. It was, was it not?

The Court: It seems to me, Mr. Kelley, that there's no controversy at all about what you've covered so far in this examination; not the slightest.

Mr. Kelley: I didn't think so, your Honor, except in that there was some attempt in that conversation with Mr. Wheeler that the engine would continue to work when the steam came through.

The Court: All this matter about the company recommending the Pickering stop, and it being put on, and accepted by the company, all that's not disputed at all, is it? [283]

Mr. Paine: No.

Mr. Kelley: Well, if we can be satisfied on that, yes.

Q. (By Mr. Kelley): Now, on December 18, 1945, there were no conditions with respect to the Pickering governor or this Brownell overspeed stop or anything about the number 4 engine that required any attention, was there? A. No.

Q. And from December 18, 1945, to July 3, 1946, did you make any other inspection of the number 4 engine? A. What was the date, again?

Mr. Kelley: Give him the question, Mr. Taylor.

(Whereupon, the reporter read the last previous question.)



(Testimony of Harry L. Olinger.)

A. Well, I was under the impression I inspected that engine approximately six months before.

Q. I understood you to say in response to your own counsel's questioning that the last inspection before the accident was December, 1945; that's correct, isn't it?

A. I believe it is. I don't recall those dates, you know.

Q. Now, it was on July 4, I believe you stated, that you first heard of this?

A. I believe it was the 4th, yes.

Q. And you mentioned they called you from the Seattle office, you meant the Hartford, of course?

A. Yes.

Q. And then on July 5, around 2:30 p.m., you went out to the plant, is that it?

A. That's right.

Q. And you went down to the engine room, and there were a lot of people there? If you'll answer so the reporter can get it.

A. As I recall, there was.

Q. And at that time, at least, it's now your recollection that both the safety devices had—were in a tripped position, is that it?

A. That's true.

Q. Yes; but you looked at the Pickering governor first, of course?

A. Well, that's one of those things where you can take them both in at a glance.

(Testimony of Harry L. Olinger.)

Q. Well, I understand, but I thought you had testified in response to your counsel's questioning that you looked at the Pickering first?

A. That's right.

Q. By the way, if the Pickering governor had been in a tripped position right after the accident, the number 4 engine itself would not have been idling, would it?

A. You mean if it had tripped?

Q. If the Pickering governor tripped the engine wouldn't [285] idle, would it?

A. Wouldn't idle?

Q. Would not idle?

A. Those Pickering governors are designed so that the engine will idle, bring them down to an idling speed. It doesn't shut the steam clear off. They're made and designed purposely to.

Q. You're sure of that?

A. All that I've seen are that way.

Q. All that you've seen. Well, with respect to that, Mr. Olinger, the governor was a part of the Sumner steam engine, the Pickering governor, was it not?

A. That's right.

Q. And this belt that's shown in exhibit 8 here, to which I just directed your attention, that was part of the governor, was it not?

A. The governor belt, you mean?

Q. Yes; that was part of the governor, was it not?

Mr. Paine: That's just a conclusion, if he's trying to establish whether the belt was part of the insured engine or not.

(Testimony of Harry L. Olinger.)

Mr. Kelley: If I can just ask a few questions without interruption.

A. (Witness): Whether it's a part of the engine or not I wouldn't make the statement; I don't know.

Q. A broken belt would prevent the continued operation of the Pickering governor, would it not?

A. That's true.

Q. That's true, and a broken belt would immediately impair the functions of this Pickering governor, would it not?

Mr. Paine: I think that calls for a legal conclusion.

Mr. Kelley: He's here as an expert.

Mr. Paine: He's not an expert. He's an inspector. If he says the belt breaks and stops the engine, what value that may have as to the legal interpretation of the insurance policy is a question.

The Court: Well, I'll overrule the objection. He can state, from a mechanical standpoint.

A. (Witness): I'll say it would.

Q. And you would also have to say that the belt would have to be replaced before the operation of the Pickering governor could be resumed, isn't that a simple fact?

A. That's very, very true.

Q. Now, Mr. Olinger, I believe you testified with respect to the Brownell overspeed stop that from its general appearance it seemed to be in an operating condition, is that correct?

A. When was this?

(Testimony of Harry L. Olinger.)

Q. When you looked at it. When did you look at, July 5? [287]

A. In operating condition?

Q. Yes. A. Well, the thing was tripped.

Q. I see. By the way, you had tested this Brownell overspeed stop on or about December 18, yourself, by overspeeding it to the tripping point, had you not?

A. I never had overspeeded number 4 engine and tested the Brownell stop.

Q. You had been there when one of the employees of the plant had done so?

A. Not on number 4 engine.

Q. Not on number 4 engine; you're positive of that, are you. A. Positive.

Q. You had never tested the Brownell overspeed stop on the number 4 engine, yourself, before this accident? A. I never have.

Q. Did any other representative, to your knowledge, any other representative of the Hartford Insurance Company ever test it before the accident?

A. Not to my knowledge.

Q. Not to your knowledge; and you were the only inspector for the defendant that overlooked this Sumner steam engine during the time of your employ in the Hartford before the accident of July 3, 1946? [288]

A. That's right.

Q. There wasn't anybody else?

A. Not to my knowledge.

(Testimony of Harry L. Olinger.)

Q. All right. Do you know of your own knowledge how high a speed the Sumner steam engine attained on any overspeed tests of the Brownell overspeed stop? Do you know that?

Mr. Paine: He said he hadn't been present.

The Court: Just a moment. He said he hadn't tested it. How could he?

Mr. Kelley: The question is now whether he had any knowledge of the results of that test, personal knowledge.

A. (Witness): How could I attain that knowledge?

Q. (By Mr. Kelley): Do you, or don't you?

A. Ask the question again.

Mr. Paine: I don't understand what this question is, as to what test Mr. Kelley is referring to.

The Court: Let's have the question.

(Whereupon, the reported read the previous question, as follows: "All right. Do you know of your own knowledge how high a speed the Sumner steam engine attained on any overspeed tests of the Brownell overspeed stop? Do you know that?")

A. (Witness): No.

Mr. Paine: Was that before or after the accident? [289]

The Court: It would apply to both, I presume.

Q. (By Mr. Kelley): When you went down there on July 5 did you notice the main belt of the engine, of the Sumner steam engine?

A. Yes.



(Testimony of Harry L. Olinger.)

The Court: He said he noticed it and it had a slight tear in it.

Q. Did you notice its position with reference to the trigger of the Brownell overspeed stop?

A. No.

Q. You didn't notice that; did you notice the east end of that belt, how far it was away from the trigger?

A. You mean where the belt goes around the pulley?

Q. That's right.

A. No, I didn't. I didn't notice that.

Q. Do you know how far that is, normally?

A. Oh, I've got an idea.

Q. Well, give us the benefit of your idea.

A. Oh, it's probably, maybe, three quarters of an inch, or an inch.

Q. Now, I understood you to say that you had some sort of conversation with Mr. Janecek when you came down there on July 5, is that correct—Mr. Janecek didn't make any claim as to what the condition of the Pickering governor was after the accident to you, did he? [290]

A. The condition of the governor?

Q. That's right.           A. No.

Q. No. Now, if I understand you, on July 5 you made three separate inspections of the Pickering governor on the Sumner steam engine?

A. That's true.

(Testimony of Harry L. Olinger.)

Q. So that I don't misunderstand you, in the first place you couldn't understand, as you expressed it, what had happened; that's correct?

A. I wondered why these devices——

Q. Yes, you wondered, naturally, why the devices hadn't worked?

A. That's right.

Q. And you tried the devices several times with Mr. Janecek?

A. That's right.

Q. And then you tried the Pickering control device four or five times on a second occasion, when you went back and you encountered Mr. Wheeler there?

A. That's right.

Q. And on that second occasion you and Mr. Wheeler couldn't get the idler pulley on this Pickering control device to work at all, could you?

A. The trip device wouldn't work, if that's what you mean. [291]

Q. It just wouldn't work, and that was four or five times?

A. Approximately.

Q. Yes; and as you stated in response to your counsel's questioning, Mr. Wheeler didn't say anything to you as to the position of the Pickering governor after the accident, did he?

A. No.

Q. And you didn't ask him, did you? That's the simple truth of the matter, you didn't ask him, did you?

A. Well, Mr. Wheeler wasn't there.

Q. Well, I'm talking now when Mr. Wheeler was there, when you and he tried it together, isn't that true?

A. That probably is.

Q. Yes, that's the truth. Now, then, you were still concerned about why that Pickering governor

(Testimony of Harry L. Olinger.)

didn't work automatically after the belt was broke, even after your experiments with Mr. Wheeler, weren't you?      A. That's true.

Q. Yes. And your concern in that respect led you to go back a third time, isn't that correct?

A. You're right.

Q. And you went back alone, didn't you?

A. That's right.

Q. And you couldn't get it, yourself, to trip then, could you? [292]      A. No.

Q. Now, in any of those times after the accident when you tried the Pickering governor was the engine operating, the Sumner steam engine?

Mr. Paine: You mean on the 5th, the day he was there, the 5th?

Q. Yes, the 5th.      A. No, of course not.

Q. So you can't say whether or not the engine idled or not on that occasion, can you?

Mr. Paine: Well, the engine wasn't going.

Mr. Kelley: I understand; that is, I would think, patent, but I want to get the witness, not Mr. Paine's, notion of it.

Mr. Paine: He's already testified the engine was not operating.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

A. No.

Q. (By Mr. Kelley): And is that the time you found loose set screws on the governor?

A. I didn't find any loose set screws.

(Testimony of Harry L. Olinger.)

Q. You never found them at all? A. No.

Q. Did you ever look for them?

A. Well, no, I didn't look for any loose set screws. I looked to see what I could find wrong with this governor, anything that I could find.

Q. But you didn't look for any loose set screws?

A. I didn't find any loose set screws.

Q. You didn't look for any, isn't that correct?

A. Yes, that's right.

Q. After the accident, Mr. Olinger, and at other times than July 5, when you made your initial inspection, did you ever try to stop the Pickering governor—try to stop the engine with the Pickering governor? A. After the accident?

Q. Yes.

Mr. Paine: You mean any other tests that were made?

Mr. Kelley: That's right.

Mr. Paine: To stop the Pickering governor, after the accident.

A. I was present at different tests.

Q. (By Mr. Kelley): I beg your pardon?

A. I say I was present at different tests for that purpose.

Q. Did the engine stop?

A. Brought it down to an idling speed, as I recall.

Q. It didn't stop it? [294] A. No.

Q. Had you ever tried the Pickering governor yourself before this accident, by stopping the engine with the Pickering governor?

A. Not in operation.

(Testimony of Harry L. Olinger.)

A. That's right. That is, I mean while the engine was in operation.

Mr. Kelley: That's all.

### Redirect Examination

By Mr. Paine:

Q. You say you were present at tests subsequently made in August, the 4th, I believe it was, when the Pickering governor stop was tested out on the machine in action?

A. I don't remember the dates.

Q. Well, the forepart of August, with Mr. McKeon, Mr. Fullmer, Mr. Murray, and some of the people from the paper mill? A. Yes.

Q. And at that time you stated, I think, to Mr. Kelley, when the Pickering governor valve stop was tripped it brought the engine down to an idling speed, but not to a sudden and absolute stop?

A. That's right.

Q. Did you have anything to do with figuring the idling speed, or just where were you in connection with that [295] experiment?

A. I think Mr. Murray and myself were taking the speed of the line shaft at that time.

Q. You were taking the speed of the line shafting? A. I did.

Q. And what speed did it come down to, do you remember?

A. Well, I'm not sure of those numbers.

Q. Well, relatively speaking?



(Testimony of Harry L. Olinger.)

A. I would say that when they tripped that it was around 300, approximately.

Q. Brought it down to about what?

A. Oh, that would be around about, roughly speaking, between 45 and 50.

Q. Now, were you also present when the butterfly valve was tested by Mr. Fullmer on the 6th? We haven't gone into all these other tests, but I don't want to leave any inference that this man wasn't present.

Mr. Kelley: By the way, this is all repetition; I didn't cross-examine him as to any butterfly tests.

Mr. Paine: Yes, I think there was confusion as to whether or not he had ever tested out this butterfly valve before this accident, or was present at any tests made after the accident.

The Court: I thought he said he wasn't present, but I'll permit him to answer again. [296]

Q. (By Mr. Paine): Were you present on the 7th of July when Mr. Fullmer and Mr. Murray was there, and the engine was operated with the butterfly valve, and it was tested?

A. I was there in the plant, but I wasn't at the engine.

The Court: The same applied the day before, I think.

Mr. Paine: I knew he was there at the plant, and I didn't want to be confused on that.

The Court: Is that all?

Mr. Paine: That's all.

The Court: Any further questions?

Mr. Kelley: No.

(Whereupon, there being no further questions, the witness was excused.

(Short recess.)

(All parties present as before, and the trial was resumed.)

### FRED FULLMER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Paine:

Q. State your name. A. Fred Fullmer.

Q. And where do you live, Mr. Fullmer?

A. Seattle, 8360-19th, Northwest, Seattle.

Q. What is your present position of employment? [297] A. Adjuster.

Q. For who?

A. For the Hartford Steam Boiler Inspection and Insurance Company.

Q. And how long have you been with the Hartford Company? A. Since June, 1928.

Q. And in what capacities have you served with the Hartford?

A. Well, the first 12 years I was an inspector, and about 2 years as a salesman, and the last 4 or 5 years as adjuster.

(Testimony of Fred Fullmer.)

Q. Adjuster in charge of the Seattle office?

A. Yes.

Q. And does that take in the Spokane territory, under the Seattle office?      A. Yes, it does.

Q. What line of work had you been in before you went with the Hartford?

A. Well, I worked for the Washington Machinery; I learned the machinist's trade there, and then I worked about eight months for the Union Iron Works.

Q. Now, in your earlier capacities you were engaged in selling insurance for the Hartford, or soliciting insurance?      A. Yes.

Q. Had you solicited the paper company in regard to insurance [298] on their property?

A. Yes, I had.

Q. Did you solicit them for insurance in regard to the line shaft and belting that was broken in this accident?      A. Yes, I had.

Q. Had they taken any such insurance with you?

A. No, they turned that down.

Mr. Kelley: That's incompetent, irrelevant and immaterial.

The Court: I think it is. I'll sustain an objection to that. I think it's already in the record that it wasn't insured. That's the only point that's material.

Q. (By Mr. Paine): Now, when did you first get notice of the occurrence on July 3?

A. Oh, I got a telephone call from our special agent, Mr. LaRocque, saying that he had been noti-

(Testimony of Fred Fullmer.)

fied that the belt had broken at the paper company and that there was a lot of damage done to the line shafting.       A. And what did you do then?

A. I called Mr. Black; this was rather late at night when I got this call, so the next morning I called Mr. Black, and Mr. Black told me that the belt had broken on the governor and caused a lot of damage to the line shafting, so I told him that I didn't think the line shafting was [299] insured, but if repair had to be made, to go ahead with the repair without prejudice to his company's rights or to ours.

Q. What did you do after that? Did you come over?

A. Yes, I told him I'd be over the next day, and then I came over, and got here in the evening of the 5th of July. I went out to the plant, surveyed the damage, I believe I talked a short time with Mr. Black, then I asked him to tell me about what had happened. He said the belt had broken and damaged the line shafting, and evidently neither one of the safety appliances had worked, so I asked him then if he'd take the butterfly valve out of the line so we could examine it.

Q. Was there anything particular that you observed there that evening—what time of the 5th was it you got in?

A. Oh, it was rather late; it must have been somewhere around 8 or 9 o'clock.

Q. Then was there anything in particular you observed at that time, or was your inspection done mostly after that?

(Testimony of Fred Fullmer.)

A. Well, I just looked around and noticed that there was some line shafting on the floor, and some broken pulleys, and didn't do anything else that night.

Q. Then did you go out there on the 6th?

A. Yes, I did.

Q. The following day, and tell us what you did or observed [300] out there at that time?

A. Well, the butterfly valve was taken out of the line then and it was taken over to the machine shop and put in a vice so that—secured so that it would work up and down, put the weight on it to see whether it would drop closed.

Q. You might just explain—I think we've had one explanation, but it may be a little better if you'll just explain what this butterfly valve looks like after you have it out and opened up.

A. Well, after you have it out and opened up, it don't all come apart, but you can see this damper arrangement in there, so that you can tell whether that damper closes clear up or it don't go clear down to closed.

Q. It's a damper arrangement that sits inside the steam line, and when it's operated it tends to go across the steam line horizontally, or opposite to the direction of the steam line, and shut it off, is that right?

A. That's right.

Q. And what was the situation in regard to how far that damper would close with the weight on the arm bringing it down?



(Testimony of Fred Fullmer.)

A. When you put the weight on it would come down to within about a half or three quarters of an inch of closing, then you could push it on down by hand to within an [301] eighth of an inch, but you couldn't close it more than an eighth of an inch.

Q. But the operation of the weight alone brought it down about how far, would you say?

A. Oh, I'd say about half or three quarters of an inch.

Q. What distance is that, now?

Mr. Kelley: I suppose a half or three quarters of an inch.

Q. (By Mr. Paine): Well, measured between what two opposites, the edge of the butterfly valve and the inside of the pipe?

A. About a half or a third of the thickness of this rail out here.

The Court: I think the question was, Mr. Paine's question was directed to what you measured that distance between, wasn't it?

Q. (By Mr. Paine): Yes, I wanted to get that into the record; what were the two opposites that you measured this distance between?

A. Oh, between the opening of the valve and the end of this damper arrangement.

Q. And what would be the effect of that situation? Would steam be able to go through that opening? A. Oh, yes.

Q. And in fairly considerable amounts? Could steam get [302] through an opening of that size readily?

(Testimony of Fred Fullmer.)

A. Well, I'd say it would. A lot of steam could go through a three-quarter inch opening.

Q. Did you ascertain what the cause was that prevented the damper of the butterfly valve from closing closer than that?

A. Well, it was sticking in the packing; it was more binding, and the last eighth of an inch, the damper arrangement wasn't central on the stem, and it struck metal, and you couldn't close it more than that eighth.

Q. And with even an eighth of an inch some steam would come through? A. Yes.

Q. Now, where is this packing or stuffing? I don't know whether it's quite clear in the record.

A. Well, this damper arrangement has a stem on each side so that it can move, and that's where the packing, it goes through this packing. The reason for that packing being in there is so that no steam can go out there.

Q. That's packed to keep the steam from escaping, and if that's packed too hard and gets caked or hard, it prevents the butterfly valve from closing fully, is that right? A. Yes.

Q. What did you do then, after you had inspected the butterfly [303] valve in the shop?

A. Well, then I told them not to do any more with the valve, not repair it or anything, just take it back and put it in the line; we wanted to make a test of that. Q. Was that done?

A. That was done, the next day.

(Testimony of Fred Fullmer.)

Q. Who was present the next day when that test was done?

A. Mr. Janecek and Mr. Murray and myself, and the engineer, Mr. Wheeler.

Q. Mr. Wheeler from the paper company?

A. Yes.

Mr. Kelley: What day was that?

A. That was the 7th of July.

Q. And what procedure did you go through then? How did you proceed to test it?

A. Well, the belt was taken off, the governor belt was removed, and the engineer opened the throttle, and the speed came up to around 250 or 260, and then the Brownell kicked out in the flywheel, we could hear a clicking noise in there; we knew that it had kicked out.

Q. That is the little automatic stop referred to as the Brownell?      A. Yes.

Q. Had tripped, the trigger which rides the arm of the butterfly valve come down? [304]

A. Yes. Well, it got to around 250 or 260, and then it didn't shut off, even though you could hear this clicking noise and know that it tripped, and, well, I don't know how high it run; it got up probably around 300 or so, and I told Mr. Wheeler to close the throttle.

Q. Was that done; was that what brought the engine back down to a stop?

A. When he closed this valve, yes.

Q. That shut off the steam to the engine?

A. Yes, then the engine stopped.

(Testimony of Fred Fullmer.)

Q. The engine at the time had no load on it, did it?

A. No, it was running free, because the damage hadn't been repaired yet to the line shaft.

Q. Then line shaft hadn't been repaired. Then what did you do after the engineer brought it down to a stop?

A. Then we went back and looked at this weight on the butterfly valve, and it had dropped, looked like it was in a closed position, and we didn't touch it. Mr. Wheeler then opened the throttle again, and the engine then took right off, with this valve in a supposedly closed position.

Q. That's this device that shows here on exhibit 8, about the center, we've talked about, this weight, it was dropped down in a closed position so that the butterfly valve inside would be in a closed position?

A. Yes.

Q. And with that, when you turned the steam on, the engine picked up speed, as I understand it?

A. Yes.

Q. What did you do then?

A. Well, we looked at the Pickering stop to see what had happened. I had been told that it wouldn't work.

Q. Do you remember who told you that; was that Mr. Olinger told you?

A. Well, there's been so many told me, I don't know just who told me then, but I went over to this Pickering, and the arm that trips the mechanism, I took hold of that arm and I could move it back and

(Testimony of Fred Fullmer.)

forth. It wasn't so you could flop it around, or anything, but it was slightly loose, so then Mr. Beguelin come along about then, and I told him he should take the set screw out and put in a tapered pin.

Q. Now, so the Judge, will get it entirely clear, just where does this set screw set on, that you noticed was loose?

A. Well, that's the set screw in this arm that trips the mechanism of the Pickering valve.

Q. And that appeared to be loose at that time?

A. Yes.

The Court: Was this on the 6th, now, July 6?

Q. The 7th, wasn't it? A. The 7th.

Q. It was the same day that you made the test on the butterfly valve? A. Yes.

Q. And you recommended that some permanent type of fastening, such as a pin, be driven in there so that there couldn't be any play in there?

A. Yes, we still had——

Mr. Kelley: Well, of course, this is inadmissible, what they did after the horse left the barn.

Mr. Paine: Pretty near all this testimony has been after the horse left the barn.

Mr. Kelley: I'll agree with counsel.

The Court: I think I'll sustain the objection. He can testify what he found there, but as to the recommendation, it will be sustained.

Mr. Paine: Well, I'll withdraw it.

Q. (By Mr. Paine): Did you have any conversation with Mr. Wheeler at that time?



(Testimony of Fred Fullmer.)

A. I don't just remember when I talked to Mr. Wheeler, whether it was the evening of the 5th, but I talked to Mr. Wheeler, and he told me he didn't know anything about it; said he wasn't on shift, but he said that he did know that the engineer, Coy, had stopped the engine. [307]

Q. That he didn't know anything about it himself? A. No, he said he wasn't on shift.

Q. Did you take statements, some statements, from other employees in connection with the matter?

Mr. Kelley; Pardon me; could you read that question, Mr. Taylor?

(Whereupon, the reporter read the last previous question.)

Q. (By Mr. Paine): I mean by that, written statements?

A. Oh, yes, I took a number of statements from different men that had been—oh, paper makers, and the engineer, that's Mr. Coy; I didn't take any statement from Mr. Wheeler, because he said that he wasn't on shift and didn't know anything about it.

Q. Now, did you examine the broken governor belt? A. Yes, I did.

Q. Now, was that on that date, or a little later date?

A. Well, I don't know just when. Somebody showed me the belt and said that it had broken, and I looked at the end of it. It was rather deteriorated.

Mr. Kelley: This is all July 7, your Honor?

A. Well, I don't know just exactly.

(Testimony of Fred Fullmer.)

Mr. Kelley: Well, then, I'd like to have counsel fix the time.

Q. (By Mr. Paine): Can you fix the time, whether it was on the [308] 7th? You were back there again in July, were you, on what date?

A. Well, it was either the 6th or the 7th.

Q. Either the 6th or the 7th, but you're not quite sure in your mind which of those two dates it was?

A. No.

Q. And you examined this belt which was shown to you as the belt that had broken? A. Yes.

Q. And what did you do with it, if anything?

A. Well, I cut that end off of it.

Q. Well, I'll show you, then—you cut an end off of it?

A. I cut the opposite end off; this end had broken.

Q. That's the end that appears rough in comparison with the end that has a smoother cut, is that right? A. Yes.

Q. And you made the cut in the belt?

A. Yes, I cut that off.

Q. Showing you, then, defendant's identification 12, is that the end of the belt that you cut off?

A. Well, it looks like it. I'd say it was.

Q. What did you do with it after you had cut it off?

A. Well, I had it in my pocket a day or two, and we looked at it up in the office, I believe Mr. Black and I looked at it. I took it to Seattle with me.

(Testimony of Fred Fullmer.)

Q. Mr. Black knew you had it?

A. Well, I thought he did.

Q. Is that your best recollection, that you looked at it in his presence? A. Yes.

Q. And you took it back to the Seattle office, and what did you do with it then?

A. I sent it to the engineering department at Hartford.

Q. And when did you see it next?

A. I didn't see it again until here three or four days ago.

Q. When we were preparing for this trial?

A. Yes.

Q. Somebody from the Hartford office showed it to you, or we had it out? A. Yes.

Q. Is it, to the best of your recollection, the piece that you cut off?

A. Yes, this is the piece I cut off.

Q. What was its condition at that time, compared to now; was the coloring the same throughout?

A. Oh, no; the oil has soaked into it, because this was a fresh end that was cut here. It's turned black, and the same way on this end.

Q. The broken and cut places were a somewhat different color immediately after the accident, as compared to [310] what they are now; was that a lighter or darker color? A. They were light.

Q. Does the belt show evidence of wear on it?

Mr. Kelley: Now, just a moment. If the Court please, that's not the best evidence. If he proposes to offer it I want to ask a few questions on voir dire, if your Honor will permit.

(Testimony of Fred Fullmer.)

Mr. Paine: Well, I think I'll reserve the offer.

The Court: Your last question was whether it showed evidence of wear?

Mr. Paine: That's right.

The Court: You mean the piece, or the whole belt?

Mr. Paine: Well, we'll first take the whole belt?

Mr. Kelley: Well, the same objection. To begin with, the belt hasn't been offered in evidence.

Mr. Paine: We haven't got the belt.

The Court: I think it appears here that the belt is not available at this time. I'll overrule the objection.

Mr. Kelley: Just a moment; may I respectfully inquire, is the belt available?

Mr. Paine: The belt was left in the paper company, and your own witnesses testified they didn't know where it was. They thought it was thrown away.

Mr. Kelley: They didn't; they said they thought the [311] Hartford had it. That's what I'd want to know before I'd permit any inquiry as to the deterioration.

Q. (By Mr. Paine): Did you do anything with the remainder?

A. I hung it back on the post.

Q. Did you ever see it again? A. No.

Q. Never had it in your possession? A. No.

Q. Don't know where it is?

A. Don't know where it is.

Q. From your observation of the belt at that time did it show evidence of wear?

(Testimony of Fred Fullmer.)

A. Well, it showed some evidence of wear, but I wouldn't say it was—it was just about like all the rest of the belts that were in use there.

Mr. Paine: I think I'll offer this in evidence now. Mr. Fullmer says it's the piece he cut off. If Mr. Kelley wants it traced to Hartford and back I'll be glad to do it.

The Court: Do you want to ask some questions on voir dire?

Mr. Kelley: Yes, if your Honor please.

### Questions on Voir Dire

By Mr. Kelley:

Q. Mr. Fullmer, I believe you said you cut off the end of the belt July 7, or whenever the date was, right after [312] the accident? A. Yes.

Q. And you only retained the portion of the belt that you did cut off, measuring two to three inches in width? A. About that.

Q. And you took that belt with you to Seattle?

A. That's right.

Q. And do you know the type of belt, does it have any trade name, that you got that day?

A. No.

Q. But you do recall that it was a light colored belt?

A. Well, that is where it was cut off, but it was still dark like this where it had been running.

Q. It was still dark like defendant's identification 12? A. Yes.

Q. And you had the whole belt with you on that day, did you not?



(Testimony of Fred Fullmer.)

A. Well, I was down at the engine, and someone handed me the belt and told me that was the belt that broke, and I cut it off and hung it back on the post.

Q. Your cut at that time was made where with respect to the metal lacing of the then belt?

A. Well, this is both ends of the belt.

Q. But it was a metal laced belt, was it, that you cut?

A. Oh, yes. [313]

Q. There was no reason why you couldn't take the whole belt with you?

A. Oh, I just didn't want to bother with it; didn't think anything about it.

Q. You didn't think anything about deterioration until many months afterward, did you?

A. No—yes, I know that that was the main reason why I wanted to take the piece with me.

Q. Then you sent it on to the Hartford and you haven't seen it until a few days ago.

Mr. Kelley: Well, we make the objection for the record, if your Honor pleases, not properly identified, and secondly, from the small object of some two or three inches it would be impossible to determine the belt in its entirety, the condition of the belt in its entirety.

The Court: It will be admitted; objection overruled.

(Whereupon, defendant's Exhibit No. 12 for identification was admitted in evidence.)

(Testimony of Fred Fullmer.)

Direct Examination

(Continued)

By Mr. Paine:

Q. Did you conduct any other tests there than these two you've described on July 7 of the butterfly valve and the Pickering governor valve, at that time?      A. Not at that time.

Q. Now, when did you come back to the plant again? [314]

A. I didn't come back again until around, somewhere around the 3rd or 4th or early in August.

Q. Just to refresh your memory, weren't you back there on the 10th of July with Mr. Vandereb when he arrived from Hartford?

A. Yes; I had never left.

Q. Oh, you had never left?      A. No.

Q. You were still in Spokane and had been out to the plant, had you?

A. I had been going out there every day.

Q. Getting statements and talking to people and that sort of thing?      A. Yes.

Q. Then were you present when Mr. Vandereb came and looked through the plant?

A. Yes, I was.

Q. Did you make any tests or inspections at that time that haven't been covered?      A. No.

Q. Now, were you back again, then, in August?

A. I was back again around the 3rd or 4th of August.

Q. And who was here at that time?

A. Well, Mr. McKeon was here then.

(Testimony of Fred Fullmer.)

Q. He's the gentleman sitting here, from Hartford? [315]      A. Yes.

Q. And you and who else from the Hartford Company were out there?

A. Mr. Murray and Mr. Olinger.

Q. And what was done in the way of making any tests on any of this equipment at that time?

A. Well, there was a test made on the Pickering governor stop.

Mr. Kelley: Just for the record, so that I won't be interrupting, if your Honor will allow me an objection to all the line of testimony with respect to tests carried on from the month of August on, for the reason that what may have existed as to the condition of the Pickering governor or the Brownell overspeed stop after the initial inspections of Wheeler the day of the accident and Mr. Fullmer and Mr. Olinger a few days after the accident, and up to and including July 10, would be inadmissible, because the evidence does not show the same or similar conditions as existed at the date of the accident.

Q. (By Mr. Paine): Well, in regard to this Pickering automatic stop, which you tested as to its working the steam valve, had it ever been taken out of the steam valve up to that time, or was it in the same condition that it was when you first arrived there? [316]

Mr. Kelley: I thought the testimony was that they took it out July 7?

The Court: No, that's the butterfly.

(Testimony of Fred Fullmer.)

Mr. Paine: There were no further tests on that, of course; it had been sent back to have something done to it.

A. (Witness): There had never been any tests made on the Pickering.

The Court: What is the date, now?

Q. (By Mr. Paine): What date was it in August? A. Around August 3 or 4.

The Court: That's the test on the Pickering stop?

Q. (By Mr. Paine): Yes, on the Pickering stop in operation, is that right? A. Yes.

The Court: I'll overrule the objection, then.

Q. (By Mr. Paine): How was that test conducted?

A. Well, the idler was blocked up and then when the engine was running, then the blocks were knocked out.

Q. Why did you have to put the blocks there, rather than have the belt on operating?

A. Well, we didn't want to throw the belt off——

Q. When the engine was running?

A. ——when the engine was running.

Q. So the idler was blocked up, and the engine was allowed [317] to run, and then what did you do with the blocks?

A. Well, we just knocked the blocks out.

Q. Did that have the same effect as if the belt had been there?

Mr. Kelly: Just a moment; he can ask what effect it had.

(Testimony of Fred Fullmer.)

Q. (By Mr. Paine): What effect would that have as compared with the breaking of the belt?

A. Well, it would be the same thing.

Q. And what happened then?

A. Well, when it dropped, then the Pickering stop shut it down to about, oh, it was idling at around, oh, 45 or 50 revolutions a minute.

Q. Who was there at that test besides the Hartford people that you've mentioned, other than some of the workmen; were any of the——

A. I don't remember. Mr. McKeon was more or less in charge of that.

Q. You don't remember for sure what paper company officials were there?

A. No, I don't.

Q. Now, was the engine actually completely stopped then?

A. Well, we had to close the valve to completely stop it.

Q. Which valve? You're not referring to this valve?

A. Well, no; the main throttle valve. [318]

Q. The main throttle valve that disconnects it completely from the steam line?

A. Yes.

Q. Did you ever have any conversation with Mr. Wheeler in regard to whether or not the paper machine had operated with the butterfly valve in a closed position? If so, when and where?

Mr. Kelley: I object to that, if the Court please, as incompetent, irrelevant and immaterial, does not involve the specific facts of this specific accident,



(Testimony of Fred Fullmer.)

and if the attempt is made to show the condition of the machine on other occasions, of course it would be inadmissible.

The Court: This is carrying out your foundation for impeachment?

Mr. Paine: Yes, it goes to the conversation Mr. Wheeler testified to, the same question that I think was asked Mr. Olinger.

Mr. Kelley: I respectfully urge that the admission of that in the first place was not proper, and the attempt to hatch it up with this witness is also.

The Court: Overruled.

(Whereupon, the reporter read the last previous question.)

A. Well, after we got a letter in Seattle from Mr. Black [319] saying that there was one question that was unanswered when we were here, and that Mr. Wheeler had now made a statement that he found this Pickering in—that it hadn't tripped—as soon as I got that letter from Mr. Black I came over to talk to Mr. Wheeler, and I just asked Mr. Wheeler about finding this governor trip not having worked, he was the first man there, and during that conversation Mr. Black was present, and I told Mr. Wheeler that I had understood that he had made statements that they had been making paper with the butterfly valve closed, and Mr. Wheeler said that he was called out from home about 5 o'clock in the morning to come down, because they was having trouble with the paper, and he said they got him out

(Testimony of Fred Fullmer.)

of bed about 5 o'clock in the morning, and he came down and found that the Brownell had tripped out in the flywheel, but was still making paper, and he re-set that Brownell in the flywheel and everything was all right.

Q. Did Mr. Janecek ever at any time tell you that he had observed or knew the condition of the Pickering stop immediately after the accident?

A. Well, in this meeting that we all had in the office of Mr. Black——

Mr. Kelley: I wonder if you could fix the time, Mr. Fullmer? [320]

A. Well, that was about August 4, I believe; Mr. Janecek said that he just didn't notice that, he was too busy with other things, and he didn't know whether it had tripped or whether it hadn't tripped at that time.

Q. Were you discussing who might have been the first one there, endeavoring to find the first person who saw it after the accident?

A. Well, that's what we were trying to find, someone that had been there right after the accident, what condition they had found it in at that time.

Mr. Paine: That's all.

### Cross-Examination

By Mr. Kelley:

Q. Mr. Fullmer, a moment ago you said that you came over to the paper mill again after you had a letter from Mr. Black? A. Yes.

(Testimony of Fred Fullmer.)

Q. Directing your attention to plaintiff's exhibit 13, is that the letter your referred to?

A. That's the letter.

Q. That's the letter; and the statement therein is correct, isn't it, Mr. Fullmer, that "When Mr. McKeon was here (at the Inland Empire Paper Company) there was one question left to be answered, that is, what was the condition of the governor after the wreck"; you mean the Pickering governor? [321]

A. Yes; yes, the Pickering.

Q. Now, you are an adjuster for the Hartford, I believe you said?

A. Yes.

Q. And you have been their head adjuster for how long?

A. Oh, about four or five years.

Q. And I presume—

A. Not head adjuster; that is in the Seattle department.

Q. You also have other adjusters under you, do you?

A. No.

Q. Well, in any event, it's part of your duties to go out and take statements from witnesses who might know something about an accident?

A. Well, where there's any question, that is to obtain the facts.

Q. And pursuant to your duties as adjuster you came over to the Inland Empire Paper Company and you obtained statements from Ralph Janosky?

A. I don't remember just who it was.

Q. We can take time, if you want to look at your files.

(Testimony of Fred Fullmer.)

Mr. Paine: If your Honor please, what is material? There's none been introduced in evidence. Mr. Kelley has copies of it.

Mr. Kelley: Well, it was brought out in direct, and I'm certainly entitled to cross-examine. [322]

A. Well, I remember that name, Janosky.

Q. And you remember the name George Leitner, you took a statement from him? A. Yes.

Q. And you took a statement from D. W. Gibson?

Mr. Paine: Now——

Mr. Kelley: If your Honor pleases, I may go slowly, but it's a constitutional handicap, and it isn't helped by Mr. Paine's interruptions.

The Court: Well, we'll see where it leads.

Q. (By Mr. Kelley): D. W. Gibson?

A. Yes.

Q. You took a statement from Mr. Coy?

A. Yes.

Q. And you took a statement of Mr. R. C. Davis, the machine tender on the number 4 machine?

A. Yes.

Q. And you took a statement of Mr. Janecek, the superintendent of the plant, did you not?

A. Yes.

Q. And you came over here especially to talk with Mr. Wheeler after you had received the letter of August 20, did you not? A. Uh huh.

Q. But you didn't take a statement from Mr. Wheeler, did [323] you? A. No, I didn't.

Q. No; at that time——

A. But Mr. Black was present.

(Testimony of Fred Fullmer.)

Q. Just answer the questions.

Mr. Paine: Let him answer; he's trying to.

Q. (By Mr. Kelley): Did you or didn't you?

A. No, I did not.

Q. And that Mr. Wheeler was the same individual who tested the Pickering stop, or at least examined it, in company with Mr. Olinger, isn't that correct?

A. That's right.

Q. And you knew the results of Mr. Olinger's investigation, isn't that correct? If you'll answer so the reporter gets it.

A. Yes.

Q. And you knew that he had conferred with Mr. Wheeler on the occasion that he was over here immediately after the accident, didn't you?

A. Well, I don't know whether I did or not.

Q. Well, what is your best recollection?

A. I believe I did.

Q. Yes. I believe you stated yourself you were a machinist originally, by trade, and that you had worked with the Washington Machinery Company?

A. Yes.

Q. And you had worked some time with the Union Iron Works?

A. Yes.

Q. And in past years you've tried the Pickering governor in the plant of the Inland Empire Paper Company yourself, hadn't you?

A. I don't know when you mean.

Q. Well, before the accident?

A. Oh, no.

Q. Never had?

A. I don't have anything to do with that.



(Testimony of Fred Fullmer.)

Q. Well, I said before you were on this investigation? A. No, I haven't.

Q. Had you tested Pickering governors in general, yourself? A. No.

Q. Now, if the Pickering governor had been tripped, would the engine have been idling after the accident? A. I'd say it would.

Q. It would; now, reference was made to a conversation that you had July 3, the night of the accident, with Mr. Black. Did you talk with Mr. Black July 3? A. I believe I did.

Q. And I believe you stated in response to your counsel's question that he told you that the belt was broken on the governor? [325]

A. That's right.

Q. Yes; and you stated at that time to go ahead and repair it?

A. Well, that's when I talked to him on the telephone.

Q. When you talked to him on the telephone, yes.

Mr. Paine: Repair "it"; what do you mean, the broken belt?

Q. (By Mr. Kelley): To repair the damage at the mill?

A. Well, I said that it had to be repaired anyway.

Q. Yes.

A. So to go ahead and proceed, without any prejudice to the rights of the paper company.

(Testimony of Fred Fullmer.)

Q. I understand you to testify that you properly qualified the rights of your employer by stating that it was without prejudice, is that your testimony?

A. Yes.

Q. In any event, you understand they had to go ahead and repair to get the mill running?

A. Yes.

Q. In fact, you came over here a number of times and conferred with both the Union Iron Works and the Washington Machinery, yourself, to get the work out as fast as possible? A. No.

Q. You conferred with Clare Olney, I believe?

A. I don't ever remember that; that is, did I go over to the Union Iron Works?

Q. You talked with Olney?

A. Well, I don't know; I may have, and I may not. He probably did come in the office, if it was, it was out at the paper company.

Q. You knew, of course, that Mr. Fred Beguelin was the master mechanic at the Inland Empire Paper Company? A. Yes.

Q. You didn't obtain any written statements from Mr. Beguelin, did you?

A. No. At that time he hadn't said anything about it.

Q. And you and Mr. Olinger were the representatives upon whom the duty of investigation devolved at that time, isn't that correct?

A. That's right.

Mr. Kelley: Now, I may be some time, your Honor.

(Testimony of Fred Fullmer.)

The Court: Well, we'll recess until 1:30, then.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Spokane, Washington

Thursday, October 9, 1947, 1:30 o'Clock, P.M.

(All parties present as before, and the trial was resumed.)

Cross-Examination of Mr. Fullmer

(Continued)

By Mr. Kelley:

Q. Mr. Fullmer, did you ever make an earlier report, a report earlier than October 18, 1946, to the defendant, that the breaking of the governor belt was the proximate cause of the loss and damage at the Inland Empire Paper Company?

A. That's what it looked like when I first went out there, because I understood that Coy had closed off the valve that closes the steam off.

Q. That's what it looked like at first, to you?

A. Yes.

Mr. Kelley: That's all.

(Whereupon, there being no further questions, the witness was excused.)

JOSEPH G. MURRAY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Paine:

Q. State your name.

A. Joseph G. Murray.

Q. Where do you reside, Mr. Murray?

A. 6833 47th Avenue, Northeast, Seattle.

Q. And what is your occupation?

A. Chief inspector of the Hartford Steam Boiler Inspection and Insurance Company, Seattle Department.

Q. How long have you been with the Hartford Insurance Company? [328]            A. Since 1930.

Q. And in what capacities?

A. I was inspector in the field until about 1936, and then was in the Chicago office as a supervising inspector until I came to the Seattle Department in 1944 as chief inspector.

Q. What had your occupation been prior to going with the Hartford?            A. Engineer.

Q. In what organization?

A. I was trained in Scotland as a marine engineer, and later came to this country and was in the power light machinery department of the Pullman Car Company, and in the Pullman Free School of Manual Training as assistant chief engineer.

Q. Now, I ask you in regard to these inspection reports that are made by the inspectors of the company, are they made under your set-up?

A. Yes, sir.

(Testimony of Joseph G. Murray.)

Q. And what is the purpose and nature of those reports?

A. Well, the nature of the reports are in order to advise any assured of any conditions which may be—even though they may be a particular object, may be satisfactory for insurance or whether it is unsatisfactory for insurance; whether or not there are conditions which require [329] attention or not.

Q. And on the basis that the company has an option, if they're not satisfied, to cancel the insurance?

A. Yes, sir, either to cancel or suspend.

Q. There's nothing in your inspections that's a guaranty to the insured, or releases him of his duties of inspecting his own machinery, is there?

A. No, sir.

Mr. Kelley: This is leading and suggestive, and gets into a field in which Mr. Murray wouldn't hold himself out as an expert, namely interpretation of the policy.

The Court: Sustained, on the ground it is leading.

Q. (By Mr. Paine): What is the purpose as far as the insured is concerned?

A. Merely to acquaint him of any conditions relative to the operation of the equipment.

Q. That your people have seen?

A. Yes, sir.

Q. Is it any service that is guaranteed to the insured? A. No, sir.



(Testimony of Joseph G. Murray.)

Q. When did you first come to the Inland Empire Paper Company plant in connection with this loss?

A. The morning of July 6, I believe it was.

Q. Who informed you of the conditions out here?

A. I had been informed by adjuster Fullmer in Seattle.

Q. And what did you do when you got to the plant?

A. Well, I surveyed the damage, which was quite a bit. It was merely a cursory examination; there wasn't anything very thorough in it, insofar as I was concerned, but I don't know exactly how far you desire me to go in that.

Q. Well, of course, what you did on the 6th, that was, I think you said, a cursory examination of the general set-up?

A. Yes, of the general conditions.

Q. Then on the 7th were you present when some tests were made in regard to the butterfly valve?

A. Yes, sir.

Q. Will you tell the Court what you saw and what was done at that time?

A. Well, I first saw the valve when it was disconnected from the steam line, and at that time the valve, when we had it in the vise and tried to operate it with a weight on the end, it closed to within half to three-quarters of an inch of closing.

(Testimony of Joseph G. Murray.)

Q. What would be the effect of its closing only to within a half or three-quarters of an inch when in operation?

A. It would allow considerable volume of steam to get to the engine. [331]

Q. Who was present at that test, beside yourself?

A. There was Mr. Fullmer and the master mechanic, I forget his name, of the paper company.

Q. Beguelin? A. Beguelin, yes.

Q. From the paper company?

A. From the paper company, yes.

Q. Did you observe anything in regard to the cause of the failure of the butterfly valve to close any closer than it did?

A. Yes, the packing was tight in the stem.

Q. The packing——

A. The packing would prevent the free movement of the stem to permit proper closing of the valve.

Q. Could it be forced down further?

A. It could be forced down. It was forced down further by adjuster Fullmer.

Q. Then what was done? Were you present when it was replaced in the line?

A. Not when it was replaced. I was there after it had been replaced.

Q. Then were you there when the engine was started up with the butterfly valve in it?

A. Yes, sir.

(Testimony of Joseph G. Murray.)

Q. What happened in that test? [332]

Mr. Kelley: Just for the record, we make the same objection, incompetent, irrelevant, immaterial, what happened in the tests after the accident and after the butterfly valve had been taken out and had been once more replaced in the line, for the reason that the same similar conditions did not prevail as at the time of the accident.

The Court: Overruled.

A. (By the Witness): What was the question?

The Court: Read it.

(Whereupon, the reporter read the last previous question.)

A. Well, the butterfly valve was set, and the trip was set, to, of course, permit steam to go to the engine, and the throttle valve was opened by the engineer, and when the valve was opened by the engineer it wasn't exactly fully opened, so far as I could see, that is, the throttle valve; the butterfly valve tripped, operated, and the engine continued to gain speed, with the result that the engineer was requested to shut the engine down.

Q. That is the so-called Brownell stop that's shown on the exhibit 11, being this little device——

A. Yes, sir.

Q. ——that operates on the wheel; that came out and hit this trip finger? [333]

A. Yes, sir.

Q. But the engine continued to gain speed?

A. Gain speed.

(Testimony of Joseph G. Murray.)

Q. I think it's been covered any number of times, but just to make clear this automatic Brownell stop, how does it operate; on what principle; what causes this little pin to come out?

A. Centrifugal force on the rim of the flywheel overcomes the tension of a spring, allowing a plunger to come out and trip the tripping gear, which is then—the movement is then delivered through the chains to the weighted lever on the butterfly valve.

Q. But when the centrifugal force operates on the wheel this little trigger just had to come out?

A. It has to come out.

Q. And if the trip finger is there it's almost a certainty that it's bound to hit it, isn't it?

A. Yes, sir.

Q. Was anything done after you had shut the engine down at that time, with the butterfly valve in the closed position?

A. Yes, sir.

Q. What was done?

A. The engineer opened the throttle valve, after the engine was shut down, and the engine started up, and he then [334] shut it down; indicating to us that the butterfly had not properly closed.

Q. The allowance of half to three-quarters of an inch you had seen when it was in the machine shop was permitting sufficient steam to go through to operate the engine?

A. Yes, sir.

Q. Were you present again on August 4, I think it was, when Mr. Fullmer, Mr. Olinger, Mr.

(Testimony of Joseph G. Murray.)

McKeon, and some of the representatives of the plant were there, and the test was made on the Pickering governor stop when the machine was in motion?

A. Yes, sir.

Q. Who was there at that time?

Mr. Kelley: Pardon me; when did you say that was?

Q. When was it?

A. That was around—it was after August 4; it was around August 4 or August 5; there were our own representatives, there was Mr. McKeon, Mr. Fullmer, Mr. Olinger, and of course myself, and Mr. Black and Mr. Janecek and the engineer.

Q. Mr. Beguelin? A. Yes, sir.

Q. And what was done at that time?

A. Well, there were preparations made to trip the Pickering [335] governor stop by blocking up, by removing the belt and blocking up the pulley. I saw the——

Mr. Kelley: Pardon me just a moment. Again for the record, your Honor understands we object on the ground it is incompetent, irrelevant and immaterial. What was done a month after the accident of July 3, 1946, by the representatives of the Hartford or anyone else is not binding on the plaintiff.

The Court: Overruled.

A. (Witness, Continuing): Well, I saw the pulley blocked up, that is, the pulley arm blocked up and the belt removed. Myself and Mr. Olinger then



(Testimony of Joseph G. Murray.)

went to the end of the line shafting with a tachometer and checked the speed, the highest speed attained when, I presume, when the pulley was dropped.

Mr. Kelley: I didn't get you; could you read the answer?

A. When the pulley was dropped.

Q. (By Mr. Paine): The line shafting was connected to the engine, so that it had the amount of load on the line shafting? A. Yes, sir.

Q. And to what speed did it bring it down? Was it a sudden, complete stop? A. No. [336]

Q. Did it have that effect?

A. The speed dropped; I don't recall the ratio between the line shaft and the engine speeds, but the line shaft I believe was reduced to somewhere around 70 R.P.M., on the line shaft.

Q. And some formula reduces that to the speed of the engine? A. Yes.

Q. You didn't make those calculations?

A. No, sir.

Q. Then how was the engine completely stopped?

A. The engine was completely stopped by shutting the throttle valve.

Q. Now, it isn't a dangerous or an improper thing to have these valves set it down to idling, without having it shut off?

Mr. Kelley: It is leading and suggestive, of course. It is incompetent, irrelevant and immaterial. We're concerned with what the facts were.

(Testimony of Joseph G. Murray.)

The Court: I'll sustain the objection. The question is how was this one set.

Mr. Paine: Well, I think the tests demonstrated that; I think the only question was, I didn't want an inference that was necessarily improper methods, or anything else, but it was a customary thing to shut them down so they idle, rather than jerk them; you can bring [337] them to a complete stop gradually, without slamming them shut.

The Court: I think that's in the record by another witness already, as I recall. I think that came in without objection, but I'll sustain the objection.

Mr. Paine: That's all.

#### Cross-Examination

By Mr. Kelley:

Q. Mr. Murray, this so-called test of the Pickering governor on August 4 or 5, a month after the accident, was that the same—was that the first test made by your company?

A. To my knowledge.

Q. After the accident?

A. That is, in operation.

Q. In operation. Well, that was the first—in operation, you mean with a load on?

A. No, with the engine in operation, irrespective of whether or not there was a load.

Q. I see. Now, during that month subsequent to the accident the Inland Empire Paper Company

(Testimony of Joseph G. Murray.)

had gone ahead and made the necessary repairs and got this machinery running again?

A. Yes, that's my belief.

The Court: Does the record show any place when [338] operation started again on this machinery?

Mr. Kelley: I don't think it does. Something I should have brought out. On or about July 20, 1946, this machinery was operating again.

A. (By the Witness): I would say it was around three weeks to a month; I wouldn't be sure of the date.

Mr. Paine: I think, your Honor, the complaint shows the premises were back in operation on the 29th, the use and occupancy is figured up to the 29th of July.

Mr. Kelley: And that is admitted by the pleadings.

Mr. Paine: Yes, we've admitted the amount of use and occupancy damage.

Q. (By Mr. Kelley): So the main line shaft and the number 4 paper machine and the Sumner steam engine were back in operation after the—about July 29?

A. To the best of my belief, yes, sir.

Q. By the way, that number 4 paper machine and the main line shafting and the Sumner steam engine are all one unit in the sense that they are driven by the same motive power, isn't that correct?

(Testimony of Joseph G. Murray.)

A. They are all driven by the same motive power.

Q. And that motive power is the Sumner steam engine itself?      A. Yes, sir.

Q. Now, directing your attention to the test of August 4 or [339] 5, did you throw off the Pickering governor and open the hand throttle to trip the Brownell overspeed stop?

A. What was that?

Mr. Kelley: I wonder if you could read the question, Mr. Taylor?

(Whereupon, the reporter read the last previous question.)

A. On August 4?

Q. Or 5th, whatever it was.

A. Or 5th, did we open the throttle to trip the—no, sir, not to the best of my—that was the day we made the test on the line shaft; I was on the line shaft all of the time.

Q. Well, to your knowledge did they do that? Did they throw off the Pickering governor and open up the hand throttle to trip the Brownell overspeed?

A. I don't know that they threw out the Pickering governor and opened up the throttle.

Q. You say you don't know whether they did that?      A. Yes.

Q. You don't know?

A. I do not know.

(Testimony of Joseph G. Murray.)

Mr. Paine: Are you sure you haven't in mind the earlier test, where they said they took off—

Mr. Kelley: No, I'm directing his attention to what I thought he testified to August 4 or 5.

A. It was August 4 or 5 I said I was at the line shaft when they threw the pulley off the Pickering governor.

Q. (By Mr. Kelley): And I understood you to say you did not know whether they threw the Pickering governor and opened the hand throttle?

A. My mistake, then.

Q. Then what is the situation?

A. The Pickering governor arm was dropped, to the best of my knowledge.

Q. And they opened the hand throttle to trip the Brownell overspeed stop?

A. I don't know about that, because, as I say, I was not there. The throttle was opened.

Q. By the way, weren't you the individual who had charge of that test?

A. No, not necessarily; when we're working together like that it's everybody's idea; whoever figures that the idea's the best one, we just go ahead with it.

Q. I see. Well, in any event, at the time of these tests was the line shaft connected to the engine by the means of the 22-inch belt? A. Yes, sir.

Q. Now, there wasn't any damage caused by reason of this overspeed test, to the machinery, was there? [341]

A. Not to the best of my knowledge.



(Testimony of Joseph G. Murray.)

Q. No. How high a speed did the Sumner steam engine attain on this overspeed test of the Brownell overspeed stop?

A. I never tested the Brownell stop.

Q. Well, how high a speed did the Sumner steam engine get to when you were present there, August 4 or 5, making the overspeed test of the Brownell stop?

Mr. Paine: I just don't want to interrupt Mr. Kelley's constitutional rights, but I think it might clear up the record, the Brownell stop and butterfly valve were tested at the earlier test.

Mr. Kelley: I'm going to state right now I don't have to submit to this coaching of the witness, and I ask that the Court permit me to examine as much as I can.

The Court: Well, proceed with the examination.

Q. (By Mr. Kelley): Mr. Murray, do you know how high a speed the Sumner steam engine attained at the time of the overspeed test of the Brownell overspeed stop on August 4 or 5?

Mr. Paine: I object to that, as there's no testimony of any such test on the 4th or 5th.

The Court: I think the form of the question is objectionable. I don't recall that there was any evidence [342] of such a test on the 4th or 5th. I'll sustain the objection.

Q. (By Mr. Kelley): When did the Hartford Insurance Company make this test?

A. On the Brownell, or the Pickering?

Q. On the Brownell.

(Testimony of Joseph G. Murray.)

A. On the Brownell, that was in July, about the 5th; I got over there the 6th.

Q. Do you know how high a speed the Sumner steam engine attained at that time?

A. No, sir; there was no way for me to check it.

Q. By the way, Mr. Murray, directing your attention to plaintiff's exhibits 15, 16 and 17, are you the same Joseph G. Murray as signed the letters as J. G. Murray?

A. I did not sign the letters.

Q. That isn't your signature?

A. No, sir.

Q. Whose is it?

A. Mr. Fullmer's, I believe; yes, sir, Mr. Fullmer's.

Q. That came out from the Hartford Seattle office?

A. Over my name. All inspection reports go out over my name, in the Seattle Department.

Q. Oh, you supervised and looked over these letters before they went out?

A. Not necessarily; I do not supervise or look over each [343] letter that goes out.

Q. Well, for example, do you recall the letter of April 25, 1945, being plaintiff's exhibit number 16, that recites: "With respect to the Sumner steam engine, no conditions were observed that require attention at this time." Do you recall that?

A. I did not see the letter.

Q. And do you recall the letter of December 18, 1945, being plaintiff's exhibit 17, which recites in

(Testimony of Joseph G. Murray.)

part: "No conditions were observed that require attention at this time with respect to the Sumner steam engine?"

A. I did not see the letter before it went out.

Q. In any event, Mr. Murray, on those dates, from April 25, 1945, to December 18, 1945, you didn't have knowledge of any conditions of the Sumner steam engine number 4 that required attention, did you?

A. No, sir.

Q. Just to make sure I understand you, I want to ask you when you tested the Brownell overspeed stop, shortly after the accident?

A. That would have been around July 6.

Q. There was no damage caused by reason of this overspeed test?

A. To the best of my knowledge, no.

Q. And then going over to August 4 or 5, when you tested the [344] Pickering governor, I understood you to say to the best of your knowledge there was no damage caused by that overspeed?

A. That's right.

Mr. Kelley: That's all.

#### Redirect Examination

By Mr. Paine:

Q. This test in July, was there anything connected to the engine in the way of a load at that time?

A. No, sir.

Q. And the purpose of the test was to——

Mr. Kelley: Ask him what the purpose was.

(Testimony of Joseph G. Murray.)

Q. You use this phrase "overspeed"—

Mr. Kelley: I wonder if counsel could—

The Court: Well, go ahead.

Q. (By Mr. Paine): Mr. Kelley used the phrase in questioning you of the "overspeed test"; what was the purpose of the test, to get the engine up to what speed?

A. To the tripping speed of the Brownell stop.

Q. I see; it wasn't to see how fast it would go; just to get it to the tripping speed, to see if it would operate?

A. See if it would operate. On that first inspection there was no way for us to get a tachometer on the engine in order to test the speed.

Q. At the test of the governor stop in August the speed of the engine was gotten up to what? [345]

A. I don't know the speed of the engine, but I know the speed of the line shaft, because that was where I held the tachometer, and that was within 310, 320 revolutions per minute, I recall.

Q. Was that within normal operating speed?

A. I'd say it was.

Q. The purpose of the test was to—

Mr. Kelley: Certainly leading and suggestive.

Q. Some question has been asked you whether the engine and the line shafting were one unit?

A. Yes.

Q. And you have explained that?

The Court: I think we can get along better if you ask the question, and then make the objection.

(Testimony of Joseph G. Murray.)

The Court isn't going to be misled by a leading question, and the objection can be made after it is stated. Go ahead.

Q. (By Mr. Paine): Are the engine and the line shaft a unit in any sense?

A. No, sir; I think I answered that in my previous statement.

Q. And another thing; on these inspections do you inspect any of the uninsured objects or machinery in the plant? A. No, sir.

Q. Your only purpose is to inspect the insured objects? [346] A. Yes, sir.

#### Recross-Examination

By Mr. Kelley:

Q. Directing your attention to this test of the Pickering governor on August 4 or 5, you say you do not know the speed of the Sumner steam engine at that time? A. No, sir.

Q. Do you know the speed of the line shaft?

A. I stated it was between 310 and 320, to the best of my belief.

Q. Now, what does that mean?

A. R.P.M.; revolutions per minute.

Q. Can you tell us from those figures what the speed of the engine would be?

A. No, I haven't got the ratio between the pulleys.

Q. Now, when the speed of the engine was going at a speed sufficient to drive the main line shaft



(Testimony of Joseph G. Murray.)

310 to 320 revolutions per minute, was there any damage to any of the machinery there?

Mr. Paine: I think that's been covered four or five times. There was no damage; they haven't sued us for any damage.

A. To the best of my knowledge, no.

Mr. Kelley: All right, that's all.

(Whereupon, there being no further questions, the witness was excused.) [347]

### PHILIP McKEON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Paine:

Q. State your name.

A. Philip McKeon.

Q. And where do you live, Mr. McKeon?

A. 577 Prospect Avenue, West Hartford, Connecticut.

Q. And what is your occupation?

A. Chief adjuster of the Hartford Steam Boiler Inspection and Insurance Company, located in Hartford, Connecticut.

Q. And how many years have you been with the Hartford Company?

A. Since early in 1920.

Q. In what capacities?

(Testimony of Philip McKeon.)

A. Well, the first 3 years, approximately, as an inspector and after that, up until 1930, adjuster, and since 1930, chief adjuster.

Q. What experience did you have prior to that time in machinery, or working around machinery?

A. Well, I went into the Pennsylvania Railroad shops in Philadelphia as a boy, and I was there almost 13 years before I went with the Hartford in the maintenance of motor power.

Q. Now, when did you first come out here in regard to this loss we've been discussing? [348]

A. August 2, 1946.

Q. And what did you do when you got there?

A. Well, Mr. Fullmer, Olinger, Murray and I went right to the plant and went into a discussion with Mr. Black and Mr. Janecek, discussed the whole thing very freely and frankly, trying to find out just what had happened, and in that meeting it was developed for the first time, as far as we knew, at any rate, that Mr. McCoy or Coy had not stopped the engine before Mr. Janecek had gone down there and seen it idling. I mean that was the first time that we knew there was a lapse of time between the occurrence and the shutting off of that valve.

Apparently everyone had assumed that the valve had been shut very quickly, while the engine was speeding.

Q. Was there any discussion there as to who had first seen the condition of the Pickering governor after the accident?

(Testimony of Philip McKeon.)

Mr. Kelley: For the record—pardon me, Mr. McKeon, we object on the grounds that it's incompetent, irrelevant and immaterial, what occurred from August 2, 1946, on, by this witness or any other witness, with respect to the Sumner steam engine, the main line shaft, and the number 4 paper machine, for the reason that the testimony shows that the machine and the main line shaft and the Sumner steam engine had been [349] repaired, renovated and placed in working operation by July 29, and that the same or similar conditions did not prevail on August 2, 1946, when this witness is purported to have made his investigation as to what may have occurred at the time of the accident.

The Court: This last question, as I understood it, pertained to a conversation at the conference, or what was said at the conference.

Mr. Paine: I think Mr. Kelley was a couple of jumps ahead of me.

Mr. Kelley: I didn't want to be objecting all the time. I want your Honor to understand I am objecting to all of this, and I propose to strike it at the end.

The Court: Well, all right, the objection will be overruled. Of course, it would be material to show what, if any, changes had been made in this engine from the time of the accident up until the time of the test.

Mr. Paine: I think the testimony is already in, your Honor, that there were no changes to the engine other than replacing of the belt.

(Testimony of Philip McKeon.)

The Court: It's always possible that there might have been some changes. The Court will let the evidence in, with the understanding that any changes may be shown.

Mr. Paine: It was the testimony of Mr. Olinger and Mr. Fullmer that the engine was in the same condition in [350] August, nothing had been done to it. Of course, the butterfly valve was changed after it was tested in July, and we put in no more tests on it.

Mr. Kelley: I think your Honor, however, gets my point that the machinery had all been put back in operating condition; the mill was operating on July 29, before this witness ever came out.

Mr. Paine: Go back to the question.

(Whereupon, the reporter read the last previous question, as follows: "We there any discussion there as to who had first seen the condition of the Pickering governor after the accident?")

A. Yes, sir, there was.

Q. Was that in the presence of Mr. Janecek?

A. Mr. Janecek, Mr. Black, and the four Hartford men that I mentioned, including myself.

Q. What did Mr. Janecek say in that regard?

A. Well, I asked who was the first one to go down to the engine after the commotion was over, and Mr. Janecek said he thought he was, as I recall it, and then I asked him, "Just tell us what you saw and did down there." He said he went down

(Testimony of Philip McKeon.)

there, he saw some water and vapor, and that the engine was idling, and he sent a water tender, a tender, anyway, over to the boiler room or over to the steam line to close the valve; so [351] then I said "I understand from my conversations that Coy had shut the valve." He said "Yes, but he decided to go over there about the time the man went that I sent"; so that brought out a fact we hadn't been aware of before; and then there was general discussion, this might have done it, and that might have done it, and I think this was on Friday, and it was arranged that when the paper machine would be down, on a Sunday——

Q. Just before we leave that, did Mr. Janecek at any time during that conversation say that he had seen the governor valve or the governor stop in an untripped position immediately after the accident, or knew anything about it?

A. No, there were many questions raised, and I don't know who asked it, I might have, but someone asked about the governor safety stop, if it was tripped, and he said he hadn't taken particular notice of it.

Q. All right, then, were arrangements made to run a test on the Pickering governor stop?

A. On the Sunday, which I believe was the 4th. The purpose of that was that the mill would be idle, and there'd be just the line shaft load, and you could do it without interruption of the job.



(Testimony of Philip McKeon.)

Q. And was that done with the knowledge and consent of the paper company people, or was it done surreptitiously on [352] your part?

A. Oh, no, they took part in it, and helped. In fact, I might say they planned it, and they had their men there, Mr. Wheeler and Mr. Beguelin. It was really a cooperative thing, our men and their men carried it out.

Q. Now describe to the Court what was done at that time.

The Court: What was this date?

Mr. Paine: August 4.

The Court: It's understood that Mr. Kelley's objection goes to all this.

A. I can't say just who did each job, but I was close by the engine when the whole thing was carried out. The engine was first put in motion—no—yes, the engine was first put in motion, and there was talk about knocking the belt off. After a little talk among ourselves we thought that wouldn't be a very good idea, and the best thing would be to make a block and put it under the idler with a string to pull it out.

Q. Why wouldn't it be a good idea to knock it off?

A. We just thought it would be a little safer; that's the way we decided to do it.

Q. Safer to the people or to the machinery?

A. Well, knocking a belt off an engine, personally I don't like it, that's all. It was all done very promptly. They fitted a nice block in there, that

(Testimony of Philip McKeon.)

is, of course, [353] they had to stop the engine before they did that, and then it was started up, and I forget the speed it attained, but the block was pulled out, and at that time somebody was on the shaft with the tachometer, because you couldn't very well put the tachometer on the engine with all the covers and apparatus around it.

Q. For the benefit of the lawyers, not the Court, what is a tachometer?

A. Well, it's a speed counter; and when the engine attained a speed, I forget what it was, but it was around what would be considered operating speed, why, the block was pulled out and the trip functioned instantly, and then the engine came down to an idling speed, and the men on the line shaft, they know what the speed was when it was running up around what you say operating speed, and then what it dropped to, and I think, I wouldn't say for sure if it was Mr. Black or Mr. Janecek, but there was discussion about the ratios, we didn't know them, not being paper makers, but the conclusion was from about 70 R.P.M. it could be fairly estimated the engine was idling about 45 or 50 R.P.M. after the block was pulled out.

Q. That means——

A. R.P.M. on the engine wheel.

Q. 50 R.P.M.; that's about 1 revolution a second?

A. Yes. [354]

Q. What you call idling speed; then how was the engine completely stopped?

(Testimony of Philip McKeon.)

A. Well, about that time, I think it was Mr. Beguelin, I don't know whether I asked him, I asked someone——

Mr. Kelley: If your Honor pleases, the answer doesn't seem to be responsive.

The Court: No, it didn't start out to be. He asked how the engine was stopped.

A. Well, I was trying to tell the sequence, what went on. The engine was eventually stopped by closing the throttle.

Q. While it was in that idling speed did you have any conversation with Mr. Beguelin?

A. I think while it was idling, I'm not sure, but about the time it was stopped, this is so long ago, in connection with all that was going on, there was talk with Mr. Beguelin about the idling speed. He said their valves all have a little clearance in their governors. I think he used the word "feathered"; that was a new word in my experience, but that the valves would all idle with the safety stop tripped.

Q. There were no other tests there that day?

A. Yes, there was; the butterfly valve was tested also.

Q. Now that I think may be improper; that was August, and some repairs had been made on it?

A. Yes, sir. [355]

Mr. Paine: Well, we won't go into that. You may inquire.

(Testimony of Philip McKeon.)

Cross-Examination

By Mr. Kelley:

Q. You say you first came to the Inland Empire Paper Company's plant on August 2, 1946?

A. Yes, sir.

Q. And at that time the plant was in operation, and the number 4 paper machine, and the line shaft, and the Sumner steam engine, were all connected together and operating?

A. Yes, I'm not sure, but I think I went down and saw it. I mean, I think it's a fact that it was operating.

Mr. Kelley: At this time, if the Court please, the plaintiff moves to strike the testimony of the witness McKeon in toto for the reason that it affirmatively appears from the witness that he first came to the Inland Empire Paper Company plant on or about August 2, 1946, and conducted some tests there at a period almost a month after the accident in question, and some time after it is admitted that the plant had been repaired and the machinery in question renovated and operating.

The Court: The motion will be denied.

Mr. Kelley: I have no further questions.

Mr. Paine: I have no further questions. [356]

The Court: All right; I was just waiting for further examination. Then you may be excused.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Paine: The defendant rests.

Mr. Kelley: May I have a minute, your Honor?

The Court: Perhaps it would be well to recess about ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

The Court: The defendant has rested, as I understand it. Do you have any rebuttal?

Mr. Kelley: Call Mr. Beguelin.

### FRED BEGUELIN

recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

#### Direct Examination

By Mr. Kelley:

Q. Mr. Beguelin, I believe you've been sworn before. Mr. Beguelin, if the number 4 paper making machinery is engaged upstairs, and this Pickering governor on the Sumner steam engine in the basement trips, what effect does that have on the Sumner steam engine?

Mr. Paine: I object to that as immaterial and not proper rebuttal. There's no evidence that the Pickering device tripped when the paper machinery was [357] in operation. The testimony as to the accident was that the clutch had been thrown and the paper machinery disconnected; at the time of the test only the line shaft was connected. It



(Testimony of Fred Beguelin.)

doesn't seem to me it is rebuttal of anything in this case.

The Court: This goes to what might have happened at the time of the accident, as I understand?

Mr. Kelley: Yes.

The Court: Overruled.

Mr. Kelley: Will you read him the question, Mr. Taylor?

(Whereupon, the reporter read the last previous question.)

A. It would shut the supply of steam off from the engine.

Q. And the engine would stop?

A. It would, it should, stop.

Q. Almost immediately?

A. Very, very rapidly.

Q. Now, was this butterfly valve in a normal operating condition at the time of the accident on or about July 3, 1946?

Mr. Paine: Well, I'll just object to that. Do you mean immediately prior to the accident, or during the accident?

Mr. Kelley: Will you read him the question, Mr. Taylor? [358]

(Whereupon, the reporter read the last previous question.)

Mr. Paine: What I'm trying to get at, if he means immediately prior to the accident, or during the accident, and so forth, and if so, how he knows it, if he wants to place it.

(Testimony of Fred Beguelin.)

Mr. Kelley: You'll have an opportunity to make your argument later. I just want to ask the question.

Mr. Paine: The question is indefinite.

Mr. Kelley: Do you understand the question, Mr. Beguelin?

A. I understand, yes, I believe.

Q. And what is your answer?

The Court: I'll overrule the objection. Go ahead.

A. Well, to the best of my knowledge it was. That's all I could say.

Q. And how close would that butterfly valve normally close?

A. Well, it never closes 100 per cent.

Q. Does any butterfly valve close 100 per cent?

A. Well, certain types might, if they were properly machined, but this is not that type.

Q. Well, would a new butterfly valve of this type close 100 per cent? [359]

A. No, I don't believe so.

Q. Well, how close would this butterfly valve normally close?

A. Oh, I would say 90 per cent, something like that.

Q. Would the butterfly valve have stopped the machine at the time of the accident if it was in the condition in which Fullmer brought it up to your shop after the accident?

Mr. Paine: I object to that as a mere conclusion. The facts are in evidence as to what it did or didn't do.

(Testimony of Fred Beguelin.)

The Court: I've forgotten, there's been so many witnesses, what his qualifications are, as an expert.

Mr. Paine: He's only the master mechanic.

Mr. Kelley: He's the master mechanic, if the Court please.

The Court: I'll overrule the objection. He can testify in his opinion what it would have done.

A. Well, I believe that would have stopped the engine, or slowed it down to less than a dangerous speed, at least.

Mr. Kelley: That's all.

#### Cross-Examination

By Mr. Paine:

Q. Mr. Beguelin, I think you said the Pickering valve should stop the engine if the number 4 machine was on there as a load, is that right?

A. That's the purpose of it. [360]

Q. Well, the purpose is to bring it down to a speed, an idling speed, something of that sort, where you won't disrupt anything, and then you can control it further if you want it completely stopped, is that right?

A. It would stop it completely if all the load were on.

Q. If the load were off and the engine were running free it would probably permit the engine to idle at about 45 or 50 revolutions a minute?

A. It probably would if everything was free, yes.

(Testimony of Fred Beguelin.)

Q. And after the paper machine had been taken off by throwing the clutches, and the line shafting was broken, if the stop operated at that time it would bring it down to an idling speed?

Mr. Kelley: There's no testimony the clutches were all disengaged. The testimony is it is composed of six or seven parts, all of which had a clutch.

Mr. Paine: I think the testimony is they were, and the line shafting broke, and it couldn't reach the machine.

The Court: Overrule the objection.

Witness: I'd like to have that question.

(Whereupon, the reporter read the last previous question.)

A. It should, yes. It would.

Q. You were present the day they tested this, weren't you? [361]

A. I was present at several tests.

Q. Well, do you remember the test in August, Sunday, August 4, when they tested the Pickering stop?

A. I believe I do. I remember one, and it possibly could have been that one.

Q. And they were there with tachometers measuring the revolutions per minute on the line shaft?

A. I didn't see the tachometer, no, I didn't.

Q. Well, you were present at that test at that time, when the engine was brought down to an idling speed?

(Testimony of Fred Beguelin.)

Mr. Kelley: Object as incompetent, irrelevant and immaterial, what happened one month after the accident, after all the machinery was repaired in running condition.

The Court: This is cross-examination of this witness. Overruled.

Mr. Paine: He's answered; I think he said yes.

Mr. Kelley: It's not proper cross-examination.

The Court: He said it would come to a stop immediately, and now counsel is inquiring why it didn't.

Mr. Paine: He answered yes, didn't he?

Reporter: I have no answer.

Q. (By Mr. Paine): You answered yes?

A. Yes, I answered yes.

Q. And at that time did you tell Mr. McKeon that these [362] stops permitted what you called "feathering," and the machines would idle, on a "feathered" condition?

A. I don't remember telling Mr. McKeon that. I remember making that remark to someone, and I don't remember that word "feathering"; I don't remember using that.

Q. Well, the substance of it was correct and is correct? A. Yes, there is clearance there.

Q. And were any changes made in the valve of the Pickering stop between July and August by your shop men? A. No, there wasn't.

Q. It was in the same condition in August as it was in July? A. Yes.



(Testimony of Fred Beguelin.)

Q. Now, the butterfly valve you say normally closes to about 90 per cent. That would be about how much of a clearance in inches between the inside part of the valve and the butterfly?

A. Oh, that's quite a thing to answer. It could be a 16th, or it could be  $\frac{3}{32}$  there, or an 8th of an inch.

Q. If it were open a half to three-quarters of an inch, that would be an excessive amount, wouldn't it?

A. Well, it would be open quite a bit at that.

Q. Well, you repaired it after July to get that clearance down closer, didn't you?

A. I took it apart and cleaned it, and it made a little [363] difference; not very much.

Q. And I think the expression you used was that it would slow it down to less than a dangerous speed, but the engine would still be running, if it hadn't any load on it?

A. That's right.

Q. That was with a load on it, it would slow it down to less than a dangerous speed?

A. Yes, it would slow it down, I believe, if it were only 75 per cent efficient.

Q. It would slow it down some, to a less dangerous speed, but the whole thing would still be running?

A. Yes, but it would be below the danger point.

Q. Without a load on it the engine would continue to gain speed?

A. It takes very little steam to operate that engine with no load on it.

Mr. Paine: That's all.

The Court: Any further questions, Mr. Kelley?  
Mr. Kelley: No.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Kelley: The plaintiff rests, your Honor.

The Court: Do you have any further testimony, Mr. Paine? [364]

Mr. Paine: No, your Honor.

The Court: The Court will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the Court took a recess in this cause until Friday, October 10, 1947, at 10 o'clock a.m.)

Spokane, Washington

Friday, October 10, 1947, 10 o'Clock A.M.

(All parties present as before, and the trial was resumed.) [365]

#### Plaintiff's Closing Argument

(Mr. Kelley made a closing argument to the Court on behalf of the plaintiff, as follows):

If your Honor pleases, as you remarked yesterday, this has not been a long trial, nor are the facts, most of the salient facts, disputed, nor are the train of events difficult to follow if we keep in mind that what started them all was the breaking of this governor belt on the governor of the number 4 Sumner steam engine.

I know that your Honor is interested more in my trying to be of some assistance in marshalling the facts here than in any attempt at speechifying, so I'll just say at the onset in a sentence or two that the plaintiff's testimony, indeed the entire record, indicates these simple facts: The belt driving the governor broke; the safety device on the Pickering governor failed to function, that device best seen, perhaps, in Exhibit 2, a picture of the Sumner steam engine with the camera facing directly toward it; that device failed to function, and the Pickering governor immediately opened wide, speeding the steam engine, the line shaft pulleys as shown in exhibits 3 and 4, and the paper machine, the number 4 machine itself, upstairs, as shown in exhibit 1, sufficiently fast that the pulleys on this line shaft were broken, and at least one, and I believe the evidence indicates two, but at least one pulley, the driven pulley for the [366] wire section upstairs, broke, as shown in plaintiff's exhibit 7.

The line shaft, as the evidence showed, was twisted and destroyed.

Now, the undisputed fact is that after the accident the Brownell overspeed was in a tripped position. The evidence of the whole record, both the plaintiff's and the cross-examination, indicates that this overspeed on the Brownell device was released by this main line belt shown on exhibit 4, which various witnesses testified was in close proximity with this trigger which is indicated on plaintiff's

exhibit 11 and designated by the letter "T," with the result that the butterfly valve, the second safety device, as shown on a number of exhibits, exhibit 8, exhibit 2, the butterfly valve was closed and the engine brought to an idling speed.

The Court: There's one thing, Mr. Kelley—I don't want to interrupt your chain of thought any more than is necessary, but there's one thing I haven't quite understood about the plaintiff's theory. It's your theory that the Pickering governor stop failed to function, of course?

Mr. Kelley: Yes, your Honor.

The Court: If the Pickering governor stop failed to function then the engine would speed up, clearly, and would "run away," as it's been put here. Why wouldn't it be reasonable to assume that that speed tripped the stop on the [367] flywheel by centrifugal force, rather than the belt coming off and throwing the trip? As I understand, it is your theory that the trip on the flywheel, the Brownell, that that was tripped by the big main drive belt being thrown out of position, the breaking of the driven pulley over on the line shaft, that that was what tripped this Brownell trip. I wondered why it wouldn't be reasonable to suppose that if the Pickering stop didn't work, the increased speed tripped that Brownell stop as it is supposed to trip.

Mr. Kelley: If your Honor pleases, may I keep that question in mind and develop it?

The Court: Yes, surely. I just wanted you to know that I didn't quite understand that feature of it.

Mr. Kelley: And if your Honor pleases, I think we can say at the onset also that the undisputed facts, as indeed shown by the cross-examination of the witness Olinger, the investigator for the Hartford, on cross-examination, were these: The governor, the Pickering governor, was part of the Sumner steam engine. Your Honor may recall that there was an effort made by the plaintiff to have the witness trace the outline of the Pickering governor on exhibit 8, and there was some objection at the time, as I recall, on the grounds that the Pickering governor would be in question a great deal of the time, and that the defense did not desire to have the exhibit cluttered up with marks, or something to that [368] effect. Now, I know that your Honor has the fact in mind that this Pickering governor was part of the Sumner steam engine——

The Court: I didn't think there was any question about that. I always thought a governor was a part of an engine.

Mr. Paine: There's been no question about it; the governor is a part of the engine.

Mr. Kelley: The defendant's answer, and there's been quite a bit of innuendo on cross-examination——

The Court: Well, I can relieve you of the burden of that part of your opening argument. It is the view of the Court that the Pickering governor is a part of the number 4 engine until the contrary is shown.

Mr. Kelley: Thank you. Then likewise, of course, it is undisputed that the belt was a part of the governor. The defendant claims that exhibit



12 was that belt. It's likewise undisputed that the belt of the governor was broke; that's undisputed. It's likewise undisputed that if the belt of the governor had not broken the Pickering governor would have functioned in the ordinary, normal manner, which was to control the speed of the Sumner steam engine. It's likewise undisputed that the broken belt, from Olinger's testimony, and at a glance it really needs no laboring on the point, that the broken belt immediately impaired the functions of the Pickering governor, and in the next [369] place, the belt would have to be replaced before the operation of the Pickering governor could be resumed or its functions restored.

Now, your Honor, will recall some objection, or at least colloquy of counsel, on the occasion of Olinger's cross-examination, to the effect that that, after all, was a question of law for the Court. Well, at the most, it would be a question of mixed fact and law. I submit that just as a matter of common sense anybody looking at the exhibit and understanding the facts would realize that the function would be impaired, but lest we seem to ignore that, I'd like to call your Honor's attention for the moment to the point relative to the impairment of function. Impairment of function means, and I'm quoting now: "The act of performing, the mode of action by which it fulfills its purpose," (Oxford University English Dictionary); "That mode of action or operation which is proper to any organ, faculty, etc.," (Webster's International Dictionary). There can't be any question of it.

Now, let's come right now to the heart of this lawsuit, and I'm referring now to Wheeler's testimony, the man who first observed the position of the Pickering governor after the accident. As your Honor recalled, Wheeler's testimony was unequivocal that the Pickering governor did not trip; did not trip, and as I say, Wheeler was the first one who noticed the Pickering governor, and he testified positively that it did not trip. Now, if your Honor will bear with me, I consider this testimony so important, particularly in view of the fact that much of it was elicited on cross-examination, if your Honor pleases, and Wheeler's testimony I have ordered out in toto, I believe you have a copy of it, Mr. Paine, and I have another copy here for the Court; I want to call your Honor's attention first to the direct testimony of Wheeler as set forth on page 2. "Question: And when you came to the mill July 3, 1946, did you go to the basement where the Sumner steam engine is located? Answer: I did; I went past the engine in question." Your Honor will bear in mind that he said he'd come on shift sometime around 2:30, and he had to change his clothes; he didn't go to work, if I recall rightly, I think it was about 3 o'clock when he was supposed to go to work. The man didn't claim to be there right at the accident, but came immediately after, and went right down. "Question: And did you observe the engine? Answer: I did. Question: Did you observe the Pickering governor on that engine? Answer: I did. Question: Was that Pickering governor tripped? Answer: It absolutely was not."

“Question: Did you observe where the belt of the Pickering Governor to which I am directing your attention on exhibit 8, do you know where that belt was? Answer: It was off; it was gone; lying on the floor. Question: Did you [371] look at the idler arrangement on the Pickering governor? Answer: I did. Question: Did you observe the screws which were holding the arm onto the shaft of the Pickering governor? Answer: I did eventually, yes. Question: And what was their character? Answer: Well, the apparent reason was that that set screw, there was an old key in that little shaft that operates the trigger that kicks out the dog on the ratchet which releases the governor and closes it, and that set screw had evidently worked loose enough so that this arm that comes down and engages with the rod that was fastened to the tightener pulley moved the rod, the rod was loose on the trigger shaft, so that it did not touch the dog on the ratchet enough to throw it out. Question: That was the reason why the Pickering governor didn't shut off automatically after the belt broke? Answer: That's absolutely the reason. I might add, if permissible, that we have to change those belts when we change speeds on the engine, change not only from the belt but from one pulley to another, sort of a cone pulley operation. When we go on slow speed we have to stop and change from one set of pulleys and belts to the other, and the day before, in the afternoon, sometime during the evening shift, I had reason to change those. We changed the speed, and when

you change you have to hold that tightener pulley up off so as to get your belt slack, and it was rather a difficult matter to do, to hold it with one hand and change the belt with one hand, and occasionally that tightener pulley will get away from you and drop, and that kicks out on you, and the day before I had that same experience; I was in a hurry and I accidentally dropped the tightener pulley and it kicked out, and I had to set it, and I was curious to know the reason it didn't kickout at the time of the wreck; I noticed it was not kicked out. The butterfly in the steam pipe was out, but not that."

Concluding the direct examination. Now, if your Honor pleases, his direct examination took about three and a half pages. For seventeen more pages he was subjected to a very skillful and thorough and searching cross-examination; properly so. He's the one man who came there and saw the situation, the first, right after the accident. True, Janecek was down there, but I'm taking this man, whose testimony can't be disputed. There'll be an attempt to impeach Janecek, but let's pass that for the nonce. I'll come to it, but this man Wheeler was there, and your Honor heard him testify. You observed his demeanor and conduct on the stand. Your Honor will have in mind that even I didn't interpose some of my useless technical objections as far as Mr. Wheeler was concerned, because he was being subjected to a cross-examination that I considered proper, went to the very heart of the lawsuit, and he was answering just exactly as he knew the facts and the truth to be. [373]



Indeed, I might say truthfully and honestly, in impeachment of myself, I learned more right in the courtroom from Mr. Wheeler on the specific point than I had ever heard before, and I am very glad for the sake of the plaintiff's case that this cross-examination went to the extent and the degree that it did.

Now, let's see what he had to say on his cross-examination. First, one of the most pertinent parts, on page 11, and while I'm going over this cross-examination I know that your Honor will keep in mind that it dove-tailed exactly with the testimony of Mr. Olinger, who testified that he also looked over the Pickering governor two days later, I believe it was on July 5, with Mr. Wheeler on one occasion. Mr. Wheeler's cross-examination, in part: "Question: Well, you found that it hadn't worked" (speaking of the Pickering automatic stop device) "the first thing, but did you try it after that? Answer: Well, you could work it by hand. Question: You could work it by dropping the rider pulley? Answer: No, not until after they tightened the set screw. Question: Well, now, let's get to this set screw. This set screw is a little screw that goes into this—what do you call it—the trigger arm? Answer: Well, yes. Question: That comes down and lies on the plate? Answer: Well, it has an eye in the end. Question: It comes into a rod here and is fastened with a little screw that goes down and rests or bites [374] into this arm, is that correct? Answer: That's correct. Question: And that's a



little inset hexagon screw, you have to have a special wrench to loosen it or tighten it? Answer: No, the set screw in there was an ordinary set screw with a square head which stood up; it wasn't a sunken set screw. Question: It wasn't a sunken set screw? Answer: Not at that time. Question: You feel quite sure about that? Answer: I am."

Now, permit the interruption; that's of great significance in view of the later testimony that this screw arrangement was taken out and replaced and repaired, and these so-called tests of the Pickering governor on August 4, a whole month later, were made when this set screw was taken out and changed and the Pickering governor repaired and renovated along with the rest of the machinery, which, as your Honor will recall, was hooked up and in operation, and it's undisputed, by July 29. Continuing with the cross-examination, speaking of the set screw:

"Question: It had a little head on it that you could turn? Answer: A square head. Question: Could be tightened or loosened by anybody applying a wrench to it? Answer: That's right. Question: If anybody had touched that or loosened it, it could be loosened up? Answer: It could be, if anyone would, but I don't know why anybody would. It was under that plate which holds the outboard bearing on the governor shaft. It was in a kind of peculiar place to get at anyway. That's one of the reasons why it probably hadn't been looked after, was it being up there out of sight, and it was tight the day before, and it was tight when it was put on." (A man

speaking now who had the servicing of the engines.)  
“It just naturally worked loose. Question: And it was tight the day before? Answer: Enough to hold, so that it tripped.”

The point was so important that counsel deemed it necessary to go back later in the cross-examination and grill the witness on it. I call your Honor's attention to the following:

“Question: All right, now then, when was it that you found that it was loose on the trigger?

Answer: As soon as I made the examination.

Mr. Kelley: This is repetition, if your Honor pleases.”

And it was repetition, because he had been taken through it for two or three pages before on the cross-examination, but your Honor properly made no ruling on it, and properly, under the circumstances, there not being a jury, permitted further interrogation on it, and this is what developed:

“Answer: That was one of the first things I did, virtually the first thing I did after I took over the shift and checked my other engines, I examined that, because I [376] wanted to know why it didn't trip out when it tripped out the day before when I was changing the belts. I couldn't understand that, but it was easy enough to see, for me, being familiar with it, that that rod was loose on the trigger finger so that it didn't trip. Question: Did you touch the mechanism at 2:30 and do anything to it?

Answer: No, sir. Question: You just looked

at it? Answer: I just looked at it. Question: By merely looking at it, all you could tell was it hadn't tripped, isn't that right? Answer: I worked the end of the rod. Question: All right—Mr. Kelley: Let him finish, please. Question: That's what I want to get at, whether you touched it, what you did with it. Answer: I touched the end of that trip rod enough to see that it was loose on the trigger finger rod. That's the way I determined it was loose. I had to take the end of it and move it a little, and it didn't move the trip rod, the trip finger."

"Question: Did you make any statements before that all you had done was to look at that device, that you hadn't tampered with it or touched it? Answer: No, I don't think anybody ever asked me anything about it."

And Mr. Olinger, if your Honor recalls, testified fairly and honestly on that point. Mr. Olinger, if your Honor recalls, testified that when he came there on July 5 he had first examined this Pickering governor along with Mr. [377] Janecek, and they tried it three or four times, and it apparently tripped, it apparently kicked out, but Mr. Olinger himself said that he couldn't understand why it hadn't worked the day of the accident. He realized that if it had worked, the accident wouldn't have occurred, and he said he couldn't understand why it hadn't automatically tripped after the belt had broken; that was why, it was on his recommendation, and the exhibits are there in evidence, it was

on his recommendation, and he's the Hartford, that they put on this automatic device, because they recognized the danger that would occur if this Pickering governor didn't function by the belt breaking, so they put on this automatic device, at his own suggestion; to use a common term, it was "his baby," and the first time he and Janecek, Mr. Olinger testified, tripped the automatic stop by hand, pushing up the idler pulley, and it tripped a number of times, so he went around and made some other investigations, this is right July 5, and then he went back to that Pickering governor and he found Wheeler there, and he and Wheeler worked the Pickering governor together, and neither one of them, Mr. Olinger testified, neither one of them could get that automatic trip to work at all, and he testified on that second occasion that they tried it four or five times, and on none of these operations did it work, and then I asked Mr. Olinger the question point-blank, because there had been some very adroit questioning on the point, [378] I asked him what Mr. Wheeler had to say, and Olinger testified that Wheeler didn't say anything at the time to him as to the condition of the trip as he, Wheeler, had found it the day of the accident a couple of days before.

Now, Mr. Olinger was a very fair, honest witness. He might have been a poor investigator on this particular point as far as the Hartford was concerned, because he said that he didn't go up and look for those set screws. I'm not criticizing him. It may be, as Mr. Wheeler said, he was familiar with it, he had



been there twenty or thirty years, that was his livelihood, that's all he had ever done, apparently, as far as this record was concerned, and there may have been a lot of extraneous reasons why Olinger didn't pick out why this device didn't work, but in any event he was a fair and honest man, and he testified he didn't even ask Wheeler what its position was after the accident. That's Olinger's testimony; oh, before we leave Mr. Olinger, your Honor will recall that on cross-examination he said that he came back without Wheeler, without anybody, he came back and he made his own investigation, and he still couldn't understand why that Pickering governor hadn't automatically tripped, so he went back and tried it several times alone, and every time, he testified honestly and I respect him for it, that it didn't work.

Now, if your Honor please, this testimony of Olinger [379] together with Wheeler's proves conclusively that the automatic device after the belt broke, at the time of the accident, failed to function, just as it failed to function within a day or two after. The Hartford's own representatives tried it, and it was not, apparently it was not until a long time later, mayhap that it was until this lawsuit as far as the Hartford is concerned, I don't know anything what's in their files on the point, but it was discovered why this Pickering governor wasn't functioning, which was due to the loose set screw. Now, this set screw was loose at the time of the accident, and this set screw, the automatic safety of the



Pickering governor, was within the definition of an object as far as this insurance policy is concerned. Now, if your Honor will bear with me——

The Court: I don't know whether you care to comment on it or not, but it would seem obvious, under your theory, someone must have tightened the set screw after the accident and then loosened it again.

Mr. Kelley: Not necessarily, if your Honor pleases.

The Court: Didn't Mr. Janecek, an agent of the company, test it and it worked, and afterward Mr. Wheeler tested it and it didn't work? That's the sequence of the tests, isn't it, on the governor?

Mr. Kelley: Well, as I understand it, your Honor, and I think I can say without fear of contradiction, from my [380] own trial notes on the point, and I would welcome your Honor asking Mr. Taylor to get out the record on it, but as I recall Mr. Janecek's testimony on that specific point, he noticed the Pickering governor had not tripped; secondly he noticed the safety chain hadn't pulled from the pin——

The Court: Yes, I remember that.

Mr. Kelley: ——then third, he didn't touch anything; he wanted the insurance man to investigate, which I submit incidentally is a very proper and sensible and logical thing for him to do.

The Court: I wasn't talking about that visit of Mr. Janecek to the engine at the time immediately after the accident. Perhaps I'm wrong, but I

thought he and some agent of the insurance company worked that pulley up and down, and it worked, then subsequently Wheeler and one of the agents tried it and it didn't work, and then it didn't work again?

Mr. Kelley: I think your Honor has in mind this testimony by H. C. Olinger that he came over here and went down to examine the Pickering governor himself on July 5, if your Honor pleases, and the first time that he went down to the Pickering governor he was with Mr. Janecek, and the two of them worked this Pickering governor together right then and there for about three or four times, and it tripped, the idler pulley, working it by hand, it apparently worked; but Mr. Olinger testified right that very same day, your Honor, [381] I think I can safely say, viewing his testimony as a whole, probably within the next half hour, mayhap within the next ten or fifteen minutes, Mr. Olinger went back there and he saw Wheeler, and the two of them went over there, and the two of them tried to trip it the same way that he and Janecek had, and it didn't trip; then Mr. Olinger, realizing that that was a most vital thing, although of course this lawsuit, the possibility of it, wasn't even thought of then, I apprehend, even by the Hartford, nevertheless in completing his own investigation goes back again, I don't know, ten or fifteen minutes, maybe an hour, I don't know, he makes his other investigation, he comes back that very same day, he tells us very fairly and squarely, alone, without anybody

around, he himself tried it and he says it didn't trip.

The Court: The point I was making, if the set screw was responsible for its working or not working, then it must have been loose at the time of the accident, tight when he and Janecek testified it worked, loose when Wheeler and Olinger testified it didn't work.

Mr. Kelley: That might well be. On that point, I call your Honor's attention to schedule 6 of the policy, particularly paragraph 4, the definition of object, and I'm quoting now:

"As respects any such engine 'object' shall mean the complete engine so described (which shall include any [382] apparatus used as an auxiliary in the operation of the engine and mounted on its frame, and all inter-connecting piping between parts of the engine), but it shall not include any piping leading to or from the engine, nor the condenser or its connecting pipe (or adapter), nor any electrical machine (other than a governor motor)"

and permit the interruption for me to say that the very specific exception for a governor as a matter of construction argues conclusively that they had in mind to except a governor; of course, in engines of this type, even though some of them may not have had this automatic safety device, which the record shows wasn't apparently on this at the beginning, all of them have to have a governor, we know that. Continuing with the quotation:

“or part thereof, whether mounted with the engine on a common shaft or bed or otherwise, nor any foundation or other structure supporting the engine, nor any mechanism, appliance or shafting connected to the engine by belts, ropes, chains, couplings, gears, pipe or other means.”

Now, if your Honor please, I haven't been able to find what we call a horse and buggy case in the Ninth Circuit. I haven't been able to find too many authorities directly in point anywheres on this specific problem, but the case of *Ocean Accident & Guarantee Corporation vs. Penick & Ford*, [383] 101 F. 2d 493, comes as close to being what we familiarly call a horse and buggy case on this question, the main question which your Honor has to decide, as to whether or not there was an accident within the purview of the policy. It perhaps may **save the Court's time** if I would respectfully ask your Honor to follow the definition of accident on schedule 6 of the policy as I read the phraseology of the opinion of the Circuit Court of Appeals of the Eighth Circuit in the *Penick* case, in passing on the term accident. In this case I might say to your Honor that the plaintiff owned and operated a sugar cane products refining plant at Cedar Rapids, Iowa, and the policy in question was issued by the Ocean Accident to Penick and Ford, and provided that the insurer would indemnify the plaintiff against loss resulting from an accident to the machinery covered by the policy. Now, the term “accident” was defined in the policy passed on by the court as follows:



“A sudden and accidental breaking, deforming, burning out or rupturing of the object or any part thereof, which manifests itself at the time of its occurrency by immediately preventing continued operation or by immediately impairing the functions of the object and which necessitates repair or replacement before its operation can be resumed or its functions restored.” [384]

If my memory serves me correctly, that's the phraseology of the policy we have in the case at bar. Now, one answer to the very pertinent question that your Honor put from the bench, as to whether or not the Brownell overspeed hadn't been tripped out by the centrifugal force, is that that of course is diametrically, and it must be in view of the evidence and the cross-examination and the statement of counsel and the whole theory upon which the defendant proceeded, that's diametrically opposite from their contention, which I apprehend will be that this Pickering governor functioned; it functioned, they will have your Honor understand, it functioned at the time of the accident, because the one time that Olinger and Janecek tried it, a day or so after the accident, it functioned then, and when they took it out and tested it on August 4, I'm speaking of the Pickering governor now, they'll say “Why, it functioned then, and the real cause of this accident was a leaking”; at least that's the only innuendo. True, they haven't plead affirmatively anything. True, there's a lot of evidence in



here that would have been objected to if there was a jury, on the contention it was such matter that should have been pleaded, but I didn't make the objection, but the inference will be urged upon your Honor that the cause was that this butterfly never closed up, and there was a lot of steam coming in, and in fact they'll say there was some hearsay [385] testimony by Wheeler that at one time the paper machine could run even though the butterfly valve had worked.

Now, the facts, the undisputed facts, are that the safety chain, the handle of which your Honor will observe is on Exhibit 9, the undisputed facts are that at least one and probably two of the employees I believe testified that they pulled it, and one of them, I think it was Leitner, said that he pulled it not once, but twice, and when he pulled it if anything the speed of the machine seemed to increase, and the undisputed facts with respect to the other end of the safety chain, going through the floor, Janecek testified without contradiction that that pin had never been pulled out by the eyes, so that the overspeed governor, as far as being operated by the safety chain, was not.

Now then, I apprehend that the defendant will maintain, "Well, the Brownell control was in a tripped position, so that shows that the safety device must have worked." Well, the answer, of course, is Beguelin's testimony, that goes undisputed, that at times even this main belt, even in a normal operation, would trip that trigger, because

it was flush with it. The testimony is, as I recall, it's only about a half inch distance away, that trigger. Of course, if the trigger were not in a tripped position after the accident, the Hartford wouldn't have any case at all, it wouldn't have any standing anywhere, because it would be [386] patent that none of the safety devices worked, but when they came into court their theory at least, I don't know what it will be by the time we hit the argument, but at least when they came into court the trend of all of their cross-examination was to the effect that that Brownell stop must have worked.

Now, if your Honor pleases, the whole thing hinges on the fact of engine overspeed. I submit that there's no testimony that the overspeed was caused by anything but the engine itself. Your Honor will recall that there was no testimony introduced here that the engine didn't seriously overspeed. Your Honor will recall, although Mr. Murray or one of the Hartford representatives was inclined to say that the steam engine and the main line shaft and the number 4 machine did not operate as a unit, your Honor will recall from your observation at the premises and the testimony of all six of those employees who were present at the time, that the Sumner steam engine and the main line shaft and the number 4 machine all operated as a unit. The only way, and the record is replete on cross-examination too, the only way that the number 4 machine could gain speed was from that engine.

Now, perhaps this is the proper juncture to pause a moment and turn back to the testimony of Mr. Black at the beginning of the trial on this point. Your Honor will recall [387] that he identified Exhibit 1 here as the general view of the number 4 machine. Your Honor will recall the testimony that Janecek and one of the employees was in the vicinity here where my pencil is indicating, at the south end of that number 4 machine, and your Honor will recall that these pulleys and these shaftings which go down through the floor connect with this main line shafting that's set forth in exhibits 3 and 4. Your Honor will recall that all this main line shafting, some 139 feet of shafting, and a number of pulleys, 8, I think, at the time of the accident, with suitable bearings and so on, your Honor will recall that that shafting in turn was connected by one main engine belt, a width of some 22 inches, I believe, heavy, stiff, 9-ply belting, which, as far as its east end is concerned, on the driving pulley of the engine wheel, is in very close quarters, and can't move to the north without hitting a wheel which would kick it back with a tendency to move it south, and of course if it moved a half inch south it would hit the trigger.

Your Honor I know recalls that this number 4 paper machine is made up of some half a dozen component parts, a wire section, a first press and a second press and a third press, the drier section, and finally, 'way back here on the south end, the calender stacks. Now, this whole machine, as I

say, was run by this Sumner steam engine. This Sumner [388] steam engine had, as we know, the two control devices, the Pickering governor and the Brownell overspeed.

Now, your Honor will also recall Mr. Black's testimony that there's a difference between the speed with which this paper goes through from the north to the south, and the speed in revolutions per minute of this Sumner steam engine. Your Honor will recall that the testimony in that respect was that there were some 346 lineal feet of paper coming out of that machine per minute, and in order to get that at the time there was some 138 revolutions per minute. Your Honor will recall Mr. Black's testimony that the maximum speed at which the paper had been run through the number 4 machine was approximately 690 lineal feet of paper per minute, which corresponds, he testified, to an engine speed of 270 RPM's on the Sumner steam engine, and that 690 feet per minute was not quite double the speed at which the engine was set at the time of the accident. Now, that's significant in view of this; there's testimony by both Mr. Black and Mr. Janecek, the mill manager and the superintendent respectively, who certainly ought to know, whose business it is to know the speed of making paper, that they hadn't made paper at that maximum speed for a number of years; my recollection was that it was at least 1940 or 1941, it might have been longer, but it was at least that. In fact, I believe Janecek gave some reasons why they didn't make that high speed [389] now.



Here is a differential that your Honor may want to keep in mind as a matter of arithmetic: The testimony is in there that there's a difference between paper speed and speed of the engine, and there's a constant fixed relationship between paper speed and the speed of the engine, and the speed of the engine in RPM's times 2.52 will give you the paper speed. Your Honor recalls those background facts, I know, and with the view of the premises and the aid of these exhibits which I feel fairly portray the situation, will understand the background upon which was super-imposed this all-important testimony from the six witnesses, every one of whom the Hartford contacted, and from every one of whom the Hartford got a written statement, according to the testimony of Mr. Fullmer, who testified and who stand uncontradicted on this, that the number 4 machine was running faster than they had ever heard it run at a paper-making speed.

The significance of that, of course, is that some of them, I can't recall their names now, or the exact times they said they had been employed, but your Honor will recall that a number of them had been employed there for many years, at least a number of years, and all of them, including the superintendent Janecek, testified that that number 4 machine was running faster than they had ever heard it run at a paper-making [390] speed.

Now, the significance of Mr. Janecek's testimony didn't strike me until the second day of this trial, but if you'll recall, your Honor, this exhibit 5 shows



the press rolls of the first press, and you will recall that Janecek stated that he was up some distance, fifteen or twenty feet, I think he put it, to the south of this position as shown. Now, exhibit 6 is a close-up view of the couch roll of the wire screen. Now, it can be further identified by I think they call these vertical pipes which appear in both exhibit 5 and 6, I think they call them water legs. Well, here are the water legs, and in connection with that, look at exhibit 7, which is a picture of the driven pulley for the wire section, and here's the belt on the pulley which leads down to the pulley on the line shaft. Now, this is the pulley that Janecek said he saw go up in the air, and he said he saw it go up when he was facing in a generally northwesterly direction. Now, then, with respect to the speed of the machine, all these other witnesses testified, Davis and the tender on the number 4 machine, testified to the pulp going up in the air. Janecek said when he was looking over here he saw the pulp go up I think he said four or five feet, and I called his attention to this pipe here at the time, and he said he saw the pulp go up higher than that, and he saw that, of course, first; he must have seen it first before he saw [391] this wire pulley.

Now, the wire pulley, if it was the first thing which broke, if it was the first thing which broke on the machinery, did so after the engine and the line shaft and the machinery were going at an overspeed, just the sequence of events, just from Janecek's testimony alone. To me that's significant. Of course,

it is for your Honor as a trier of fact to weigh the probative value, but it seems to me that that's significant of the fact, in addition to the sworn testimony of these other witnesses, all of whom gave written statements to the Hartford, and all of whom are uncontradicted on the point that the engine must have been running away, and why did the engine run away? Because the control devices didn't work.

Now, it would seem that would be patent, but we also called in a gentleman who is very familiar with this identical machine, who had gone out to the paper mill any number of times over a quarter of a century, who was a capable expert, an engineer, both a mechanical and structural engineer; I believe he's the chief engineer and assistant manager there of the Union Iron Works; I don't apprehend that because the Union Iron Works did the repairing and at least supplied some of the machinery after the accident to the paper mill, that anyone would impugn the testimony of Mr. MacCamy, who testified in response to a hypothetical [392] question that set forth all the facts, and which, although there was a time at the moment, I remember there was some effort to pooh-pooh it, but it had to contain the factor of overspeed, and it wasn't begging the question, because all these six witnesses had testified that they heard this increased speed, that the steady hum of the paper machine at along about 346 lineal feet, or whatever the particular grade was they were making, was familiar to the machine tenders, and they recognized that by then, they heard this roar

or this loud noise and this overspeed, and Mr. MacCamy testified that assuming all the factual situation, and I think the hypothetical question properly embodied what had been testified in the record, assuming all that, what in his opinion produced that damage, and he testified the run-away speed of the engine. Then he was asked the question "What in your opinion must have happened to the control devices on this engine to produce such damage?" and he said they didn't function.

We know the Pickering governor didn't function. We know the safety chain that was pulled didn't function. Now, then, the only other fact the Hartford could stand on was that the Brownell overspeed was in a tripped position, which was undisputed; no representative of the mill says otherwise, but in the same breath the Hartford by their questioning and cross-examination and by their argument will say that that [393] butterfly valve permitted the steam to come in, because it was improperly closed. I apprehend there may be some argument with respect to packing on that, but Mr. MacCamy said that in his opinion the control devices didn't operate. Now, he was also asked on redirect, if I recall, assuming that the trigger of the Brownell overspeed stop was tripped, what could have caused it. He said the trigger being located as it was could have easily been tripped by the main belt, which was, of course, loose as the result of the accident, and unrestrained as to side movements.

Now, also touching on the query your Honor made some time ago, he was asked this question: "In your

opinion would the pulleys on the line shaft have exploded if the control devices on the engine had functioned?" and he answered "No, because the control devices should have functioned before they reached their critical rim speed." Now Mr. MacCamy has had, as I say, a wealth of background and experience in this line. You were told in the opening statement of defendant that experts would be called. I apprehended that there would be some argument impugning Mr. MacCamy, perhaps, because he might be interested in keeping in the good graces of the Inland Empire Paper Company, or something of that sort, and they would have some independent, and we know that the Hartford Company with its vast resources and contacts, if they could have had some independent engineer come here and [394] give independent testimony that the failure of the control devices did not cause this loss and damage, they would have done so, and in fact, I think a reference by Mr. Taylor to the record would bear me out in this, that you were given to understand in the opening statement that there would be such an expert. Now, there hasn't been.

The theory of the defendant as I see it, they have some theory as far as their pleading is concerned, their pleadings would indicate there was no accident within the policy, paragraph 4 of the answer, that the governor belt was not part of the steam engine, paragraph 5 of the answer; that would indicate some theory, but as far as their evidence is concerned, there isn't anything introduced here but confusion sought to be engendered on their cross-examination.



There's been no affirmative testimony showing any theory on the part of the defendant, and I submit, if your Honor pleases, that the plaintiff has sustained the burden of proof in this respect; before I leave, first with respect to this Pickering governor, it is undisputed that the belt broke; secondly, it's undisputed that if the automatic safety had worked the speed of the Sumner engine would have been controlled at least to an idling speed. I don't see how Mr. Paine or anyone else could controvert that. In the third place, Olinger failed to get the automatic safety stop to work on numerous attempts only a couple of days after the [395] accident. In the fourth place, all concerned, prior to the accident, everybody, the Hartford and the Inland both, all concerned agreed that the safety device as originally recommended by the company were O.K. Your Honor has seen these exhibits in which the company has stated not once but several times, December 18, 1945, no conditions were observed that require attention at this time, specifically speaking about Sumner steam engine number 4; I'm referring now to plaintiff's Exhibit number 17. The company said the same thing on April 25, referring specifically to Sumner steam engine number 4, no conditions were observed that require attention at this time, and it came from the Hartford, although there was some quibbling about Murray not signing the letter; and then we have Wheeler's testimony on cross-examination that he had been changing the belt just the day before.



That's the plaintiff's case. What have we got against that? Tests made by the Hartford a month later, when the machinery, line shaft, and the butterfly valve at least, had been repaired and put back in working order, and also a pin had been placed in the Pickering governor in place of the previous set screw, and of course the thing that made the automatic stop work on August 4 was this pin that replaced the set screw. Secondly, in explanation why the Brownell overspeed was in a tripped condition, there was no [396] testimony here adduced by the defendant, if your Honor pleases, that the Brownell overspeed was not in a normal operating condition, but Beguelin's testimony was affirmative, not only on direct but again on rebuttal, that it was in a normal operating condition.

Now, again, there's no testimony adduced by the Hartford that the main line belt could not have tripped the trigger at the time of the accident, and opposed to that you've got Beguelin, you've got Janecek, you've got MacCamy, who all said that it could have. Indeed, Beguelin testified that it actually, during normal operations, had tripped it, and your Honor has the pictures there.

In the third place, this emergency safety chain never worked; the pin was never pulled out of the eyes, Janecek testified. Finally, the engine was idling after the accident. The evidence is that the amount of steam going through the butterfly valve when it was closed as far as the counter-weight would close it still would only permit steam to permit the engine

to run at an idling speed. In other words, the Brownell had not been tripped; in other words, the Brownell had not been tripped, if the Court please, by the centrifugal force. The butterfly valve had been closed as far as it was possible to do so.

I regard these factual questions as all determinative of this case, if your Honor please. [397]

The Court: We'll recess for about five minutes.

(Short recess.)

Mr. Paine: I wonder if I might ask your Honor's indulgence slightly. I have in my own mind broken this argument into two phases, one dealing primarily with the factual situation, the other dealing with the law, even assuming the factual situation might be established in accordance with the plaintiff's theory. I'd like to devote about an hour to the factual situation, so that if possibly we might run five or ten minutes over-time in the noon hour, it would make a more natural breaking in the argument.

The Court: Yes, all right.

Mr. Paine: Just out of sequence, but in passing, in order to clear up any inferences or imputations that Mr. Kelley made in regard to the failure of the defendant to call Mr. Vandereb as an expert witness, he was brought out here as an expert witness, and I think I did refer in my opening statement that I might call him. Your Honor might remember that at the conclusion of the testimony we adjourned early, and we had an agreement that I would in the evening attempt to eliminate any

duplicating testimony. I have no criticism of Mr. MacCamy, no imputations that he wasn't entirely honest, due to the fact that the Union Iron does work for the Inland Empire Paper Company, and when I read over Mr. MacCamy's testimony and carefully analyzed the [398] various things he had said, I realized he had covered all the expert testimony that I thought could be covered in this case, and would be purely repetitious by Mr. Vandereb, and I knocked it out for that reason, and I'm perfectly willing to rely on Mr. MacCamy's testimony. I don't think there's anything harmful to the defendant's theory, and it is extremely important, as I will show.

To begin with, we have to keep clearly in mind this is a suit under an accident policy of insurance. We are governed by that, and it's whether or not the damages that are sought to be recovered here are covered by that policy of insurance. The policy of insurance under section 1 of it is to pay for loss of property to the assured directly damaged by such accident, according to the various schedules contained in the policy, and under schedule 6, the only accident which the policy indemnifies for is an accident caused directly by the breaking, an accidental breaking, of some part of the insured object.

Now, Mr. Kelley in closing up his argument here is apparently going on the assumption that he can recover if he establishes that the engine overspeeded. Of course, this isn't a policy of insurance to cover for damages caused by the overspeeding of an

engine. He's going on the further assumption, and he wound up his argument on that basis, that the control devices failed to function, the engine was running away because the control devices didn't work, as if he were covered under a policy of insurance which protected him from damages in the event of the failure of one of the control devices to operate, but of course he has no such policy of insurance. The breaking of this belt had nothing to do with the failure of the control devices to operate. Of course, it had nothing to do with the failure of the Brownell stop to operate; it wasn't in any way connected with it. It had nothing to do with the failure of the Pickering device to operate; it was the thing that when it broke set the Pickering device off. It was the event which started the Pickering device to functioning, but it wasn't the thing that caused the Pickering device to fail. If the Pickering device did fail, which we claim it didn't, if the Pickering device failed it was due to this so-called improperly set or loose set screw, but there was no breaking of the set screw under the terms of the policy.

Had some portion of the Pickering automatic safety device broken and caused it to fail to operate, then Mr. Kelley might have a logical argument, but the breaking of the belt was in no sense a cause of the failure of the device to operate; it was the inceptive force that caused the device to operate. Something else had to happen if the device failed to operate, to cause it to fail to operate, and to



recover under the policy that would have to be in the [400] nature of a breaking. If it were of a nature that wasn't a breaking, of course there would be no recovery under the policy. Now, as we say, it has to come fundamentally under the policy. The burden of proof is cast upon the assured to show that it does come under the policy. It has to be an accident under the terms of the policy, and an accident, I think I have a couple of well chosen definitions, one from Webster:

“An event that takes place without anyone's foresight or expectation; an undesigned, sudden and unexpected event; chance; contingency; often an undesigned and unforeseen occurrence of an afflictive or unfortunate character.”

And from the case of *Smith vs. Cabarrus Creamery Company*, 8 S. E. 2d 231:

“If the influences, often complex and marked, which bring it about were capable of exact analysis, it would lose its character as an accident. As judicially defined, unusualness and unexpectedness are its essence.”

Now, the testimony here is replete from their own witnesses that the breaking of this belt is an ordinary, usual, foreseeable, expected event; that those belts break regularly, and that was the very purpose of putting on to the engine a device that would counteract any effect that the breaking of [401] the belt might have. Now, had there been no such device upon the machine, and the belt had broken and re-



leased the governor from its control of the engine, then you might say that you had a breaking of a part there which caused the overspeed of the engine, but after the installation of the safety device, the Pickering stop, the breaking of the belt doesn't start the engine to going; it starts the safety device to stopping the engine, and the failure and the cause of it is just as Mr. Kelley said with great vehemence at the end of his argument, the whole thing here is because these control devices failed to operate, but he has sustained no proof that they failed to operate, because of the breaking of the belt, because the breaking of the belt of course didn't cause them to fail to operate; it was the thing that should have put in motion the stopping of the machine.

It seems to me the burden cast upon the plaintiff in this case is to show the following things: First, that there was a sudden and accidental breaking of a part of this machine that directly caused the damage; secondly, that the damage from overspeed isn't insured for that, so they've got to show these facts, first that the belt accidentally broke—bear in mind there isn't any testimony yet as to when the belt broke or why it broke. If a workman had gone through and accidentally struck the belt with a crowbar and the belt had severed, there might have been some argument as [402] to an accidental breaking. Nobody knows whether the belt broke when this first sequence began, whether it broke in the middle, or at the end, so this becomes more or less like a criminal case. We've got a malefactor who

has committed some crime, and we run him down through an examination of the physical evidence primarily, an examination of the direct testimony secondly, but as your Honor knows from your experience in the practice of the law and on the bench, the physical facts where they demonstrate a condition are far more conclusive than the memory of humans as to whether they saw something existing at the time, whether a light was red or green, or whether a device was tripped or whether it was open.

Let's follow through what they've got to show. They've got to show that the belt broke accidentally; that the breaking of the belt disconnected the governor and allowed the governor valve to open and the governor stop failed. Now, at the time this belt breaks two things happen simultaneously; the balls on the governor device collapse because the force from the engine has been removed from the governor. It proceeds to open the governor valve and let the steam come through. At the same time that that happens, instantaneously with it, the rider pulley drops off the belt, because the belt is gone, and of its weight falls down and hits the trigger and releases the safety device which counter-acts [403] the effect of the balls collapsing, by shutting off the valve.

Now, their theory has got to be that when the belt broke this automatic tripping device failed to operate, then that the engine increased speed, then they've got to show that the safety chain device which was pulled up here failed to stop the engine

before the damage was done, because the men testified they went over there and pulled it before the damage was done, but it failed to operate; then they've got to show that the Brownell stop down on the wheel here, operated by centrifugal force, failed to operate because when Mr. Janecek first saw this, as Mr. Kelley pointed out, that wheel and the paper and so forth up here was already going at a speed in excess of the speed at which the Brownell device was set to function, so the Brownell device must have failed, under their theory, or the engine would have been slowed down and no damage would have been done. Then they've got the situation developed where the Pickering device has failed, the hand pull has failed, the Brownell stop has failed, and the engine is racing away, and the property is being damaged, but they've got to stop that engine, because it did stop. Now, there are only three humanly possible ways to stop it, one by the engineer going and disconnecting the whole thing from the steam line, or its being stopped by the butterfly valve or the Pickering valve. Everbody agreed the engineer didn't do that. It is uncontroverted that he [404] went up this cat-walk and shut off the steam after the engine came to an idling speed, and finally brought things to a dead stop; so they've got to stop this engine, and they can't stop it by the Pickering device, because they're depending upon that having occurred at the beginning of the sequence and not functioning so they cogitate this matter for some time, and finally arrive with a speculative theory

that nobody saw, that the dancing belt at the end of this destructive sequence hopped off the wheel, came over and hit the trigger that should have been hit by the Brownell stop, and that brought the machine down to an idling speed.

The Court: Pardon the interruption. There's a point that is a little confusing to the Court, the apparently conflicting theories with respect to these two stops. As I understand it, your theory is, or at least you subscribe to the contention that the Pickering stop worked?

Mr. Paine: That's right.

The Court: When the belt broke; all right, if the Pickering stop functioned when the belt broke, then the engine, according to your theory, would have been immediately reduced to idling speed?

Mr. Paine: That's right.

The Court: All right; what then could have thrown the Browning stop, which has to attain an overspeed in order to trip automatically by centrifugal force? [405]

Mr. Paine: It's all based upon the fundamental misconception in this case, for which there is no evidence, that the belt broke when the machine was operating at a normal speed. Our contention is that's not at all what happened; after this machine had attained the speed at which it was going, and after the destruction had become prevalent, and these things were flying through the air and hitting the oiling machinery, which is right next to this belt, that at that time the belt broke, either by something thrown through the air or by the increased speed,



when the machine has speeded up and this damage has been done and this device is being driven faster and faster by the belt from the engine, then either to something hitting it or the mere strain, as the belt will show, broke the belt. The belt breaking at that point in the sequence of events immediately tripped the Pickering device and shut down the engine, and that's the only physically possible way, as I'll demonstrate, that it could have happened, because the other stops had failed to shut the engine down. We'll show you that all the testimony is that this thing must have worked before that time, and the tripp-hammer must have worked, but when they worked on the Brownell valve and the tests made later, the Brownell valve——

The Court: The butterfly.

Mr. Paine: The butterfly valve, it did not close sufficiently, so that the steam came through it and the engine [406] kept increasing speed, therefore the only other device left to stop it, and we know it was stopped, was the device on the Pickering valve; therefore as a matter of pure logic it follows that the belt broke at the end of the sequence and not at the beginning.

If somebody had been down in the basement, and said "I was passing by the number 4 machine, and the machine was operating normally, and everything was going smoothly and I heard a snap, and I looked up and this belt that operates the governor device was broken, and had flown through the air or was dropping over the wheel, and then this immediate



increase in speed took place," why, of course, you'd be faced then with the proposition that you knew when the belt broke, and what the sequence of events were, but nobody was there, nobody knows, and that's the basis of Mr. MacCamy's testimony. Mr. MacCamy was asked as an expert witness "Well, is this breaking of the belt the only thing that causes overspeed on one of these engines," and he said "Oh, no, there are many other things that may cause that engine to overspeed; your pulleys and pins and devices inside the governor get stuck, or there are are any number of things." He didn't elaborate them, but he went on to say that it was entirely usual, and that he doesn't know, and nobody knows what caused the overspeed. If the overspeed was caused by something other than the breaking of the belt to the governor, then it's clear [407] from the factual situation in regard to how the engine got stopped that it was the breaking of the belt to the governor, allowing the rider pulley to fall down and the mechanism to operate, that brought that engine to a stop.

That's the only physically possible theory under the facts, and I think the uncontradicted, or at least the overwhelming weight of the evidence. It accounts for all the facts and all the testimony, makes a complete whole out of this thing.

The Court: That would necessarily assume that the Pickering governor itself was not functioning normally.

Mr. Paine: That the governor itself, through some other cause, the slipping, there's testimony

there was oil on these belts, on the variable cone pulleys, friction, or lack of lubrication, there are any number of causes that might permit the engine to overspeed without the breaking of the belt. It was assumed, well, sure, that this thing broke first and that caused all this overspeed, and that was assumed more or less by the paper company, more or less by the first adjusters, well, that belt was found broken, sure, the belt broke and that caused the overspeed; if it did cause the overspeed, of course, the Pickering device must have failed, or it would have stopped it right at the inception. Mr. Fullmer says he thought that was true and Mr. Coy turned off the steam and brought it to a stop, but as they went further into this [408] investigation of this crime, they found Mr. Coy was eliminated, he couldn't possibly have done it. They began examining the facts relating to what the butterfly valve had done, and they must come to the inescapable conclusion that the butterfly valve didn't do it. Well, we've eliminated the only two possible causes, and we're at a stalemate; nothing caused this machine to stop; it should be flying to pieces throughout the building, but it didn't; let's examine our original premise. Then they come at once to the conclusion "Well, how do we know this belt broke at the inception of this thing? If the belt broke at the end of the events, when this machine was going rapidly and objects were flying around, what would happen? Then the stopping device would operate and it would stop." Then the paper company, seeing the

danger of that, I think they didn't catch it, Mr. MacCamy was misinformed, and he may have suggested to them "But wait, that can't be, because when that automatic Pickering device stops, the engine stops, it doesn't idle, so therefore it couldn't be the thing that stopped it;" but they had forgotten Mr. Beguelin. Mr. Beguelin knew that this thing would merely bring it down to an idling speed when there wasn't any load on it, and there wasn't any load on it at the end of this thing. The paper machine had been taken off by the clutches to begin with, and of course by the breaking of the line shaft, so that the engine was running free without any load [409] on it, so Mr. Beguelin says "Yes, that valve doesn't shut it down tight, she'll idle"; and they tested that on the 3rd without any change in condition; the change of putting the pin in the stopping device was of no moment; what they were testing was the effect of the closing of the valve after the stopping device had operated, and they took their men out there with tachometers, in the presence of the paper company officials, and they showed that when the Pickering device operated on the engine without any load on it, it brought it down to an idling speed. That was the testimony as to what the condition was after the accident, so then of course they came to the inescapable conclusion that it was the breaking of this belt at the end of the chain of sequences that had caused the engine to stop, because it is out of the question that any other thing could have done it.

Now, let's look that over with a little more care in connection with the testimony. There is no testimony whatever as to any actual testimony when the belt broke. There isn't any testimony that the breaking of the belt caused the engine to overspeed. It's the undisputed testimony of their own expert that there are any number of other causes that don't involve the breaking of that particular belt that could have caused the engine to overspeed. The Court is in this position, determining first what caused the overspeed, no positive evidence of any cause, no positive evidence that the [410] belt broke at that time and caused the speed, the undisputed evidence of their own expert that the increase in speed could be caused by any number of other causes other than the breaking of this belt; nobody was there to observe what they were; they left no evidence behind other than that a certain amount of oil shows on these other pulleys, and if they slip with that oil on, of course they lose their effect.

Then we move down in their sequence of what must have happened. Their sequence is first that this governor device must have failed to operate. Now, what is the testimony in regard to that? It's a very peculiar situation. I don't know just what's gone on. I think your Honor put your finger on it pretty close here when you asked "Does this raise the inference that this set screw was tightened up and then loosened down again?" Now, here is the undisputed testimony on this. Mr. Wheeler says that the day before the accident he had occasion to change this belt, put it over on to the other pulley,



and he doesn't know which way it went; that in the course of that operation he took the belt off the idler pulley dropped and the device operated, so it was in operating condition the day before the accident. Now, the next thing that was discovered in this sequence of events was that on the 5th of July—no, the next thing, I think—well, there may be a little confusion, but on the 5th of July Mr. Janecek and Mr. Olinger, as soon as Mr. Olinger arrived, went [411] to this device and the device was in a tripped position at that time. Now, that of course is a day and a half after the accident, but Mr. Janecek and Mr. Olinger went up there and operated that think four or five times, and every time it operated. Now, that would leave the inference, according to their theory, that it operated immediately before the accident, it missed the one operation that was vital to this case, at the time of the accident, got itself back in shape again and operated four or five times right after the accident, then significantly, I think, and I don't want to cast too much aspersion or anything, I don't know what may have happened there, Mr. Olinger was gone for a half an hour, and when he came back at the end of that half hour, he and Mr. Wheeler went over to this device, and the device from that time on never operated again in the condition in which it was.

They then took that set screw out and put a pin in. He tried it with Mr. Wheeler four or five times; he tried it by himself four or five times, and it



didn't operate. Now, as your Honor said, is the inference from that that this pin was loose at the time of the accident, and that somebody screwed it up so that it was tight at the time that Mr. Janecek and Mr. Olinger operated it, and that then somebody unscrewed it and loosened it up so that it was loose when Mr. Olinger and Mr. Wheeler operated it? That seems almost too incredible, but if you leave out the one time of the accident, [412] then it is possible, that either that screw was loosened up once between the time Mr. Janecek and Mr. Olinger operated that device and the time he and Mr. Wheeler operated it; now, whether that was done deliberately or whether it was done accidentally or whether it was done as a result of the operation of several times of this device by Mr. Janecek and Mr. Olinger, doing that right one time after another had loosened that screw, I don't know.

I'm not going to make any imputations in regard to it, but if the device operated in the middle instance there, when the engine stopped, at least you have the consistency that the device continued to operate up to a certain period, and then from there on ceased to operate because the screw had become too loose. Without it you've got the very anomalous situation that it operates before the accident, but at the crucial, important moment, they claim it doesn't operate, and the screw tightens itself back up and proceeds to operate every time Mr. Janecek and Mr. Olinger attempted to operate it. If it showed signs of looseness, once it operated, once

it didn't, once it did, once it didn't, and finally quit, you might have a different situation, but that isn't the testimony, and I think it raises a terrific assumption here that that screw had been loose, and at the time it had to trip and do something, tightened itself up and tripped, and then got loosened again. I don't know, as I say, whether it was [413] loosened accidentally or on purpose; I don't know as to the testimony of these eye witnesses to this condition, which I say after the passage of time is not to be considered nearly as strong as the physical facts, but what do we find?

Mr. Kelley with a straight face tells us the first person who saw this after the accident was Mr. Wheeler. We went through quite a bit of testimony, and I know your Honor knows that's not the first man that swore under oath he saw it. That man was Mr. Janecek. I haven't any doubt it was a great surprise to Mr. Kelley and Mr. Black when he so testified. I don't want to accuse him of deliberately lying in that regard here; it had been talked about and he had undoubtedly talked this over and thought it must have failed to operate, and he was there, and now he thinks about it, but your Honor knows that this was one of the very important things in this whole investigation, that Mr. Janecek sat idly by for a year and a quarter and never even told Mr. Black until he told it from the witness stand. Now, you know and I know that if Mr. Janecek had in his mind during this whole year and a half that he had seen this thing, and sat there in his office when all these men from Hartford wanted to know

what in the world was the condition of the device after the accident, who saw it, and they called in any number of people and said "Did you see it?" "Did you go near it?"; Coy says no, and finally, two months afterward, they come to Mr. Wheeler, but not a [414] word from Mr. Janecek any time during that whole period.

There's no question that he didn't have any recollection of it; that recollection has come back to him as he thought about the necessity of having that in a non-operating condition. I think that's somewhat true of Mr. Wheeler; I think he's more honestly disposed in regard to it, but Mr. Wheeler was there with Mr. Olinger the 5th of July when these tests were being made, Mr. Wheeler knew it was of extreme importance as to what the condition of that was; Mr. Wheeler didn't tell anybody until Mr. Black got him in, finally on the 20th of August he says "Now, we've cleared this missing point; I've contacted Mr. Wheeler and he says that he saw it."

In the meantime what is the human testimony in that regard? I think frankly the most honest witness I've seen in many a year was Mr. Beguelin. I think he was under a terrific handicap, on a hot spot in this case. His testimony as master mechanic out there might win or lose this lawsuit. Mr. Beguelin came in here and testified I believe absolutely to the truth in all respects. He testified when they put this test on out there on the 3rd of August that the Pickering stop brought that machine to an idling

speed, when he knew it might be vital in their case that the machine come to a dead stop. He testified that previously when that device was operated with no load on the machine it would only bring it to an idling speed, with the testimony that that thing brought [415] it to a dead stop might have been vital to their case. He testified that he built that device, and he went immediately to the scene of it, about 4:30 in the afternoon, of the accident, and what did he say? He said the device had operated.

Now, then, if you're going to put credence into human testimony here, I'd put it in Mr. Beguelin. I stood right in front of him here when I was questioning him on that regard. I could see on his face that he wished he could say that device hadn't operated. He knew that would corroborate Mr. Janecek and Mr. Wheeler, and their case would be complete, but Mr. Beguelin felt that the truth was more important than any lawsuit. He hesitated for a moment; the record will show it; he hesitated for a moment, as to whether that device was open or closed, and he said "No, sir, that device had tripped when I saw it at 4:30 that afternoon." Now then, that was the evidence the paper company was up against. The first witness that they had been able to positively place at the engine after the accident, that had observed the device, was Mr. Beguelin, and Mr. Beguelin said the device had operated, and so for two months they struggled to get some witness ahead of Mr. Beguelin who would say that it hadn't operated, and it took them two months before Mr.



Wheeler's recollection came to the fore and he said "I remember now, it hadn't operated." Up to that time in his conversations with Mr. Olinger and Mr. Fullmer, Mr. Fullmer was trying to get statements, Mr. [416] Wheeler said "I wasn't on shift at the time; I don't know anything about it"; yet on August 20, when it had gotten down to the point where they've got to find out if that device worked or it didn't; if it worked it's one thing, if it didn't work that's another, that's the thing that's left, after they had all left there with that question undecided Mr. Wheeler comes through and says, in thinking that back over, he says "Yes, I think I saw that; I'm positive of it." Your Honor knows human nature; once you start to stir your own recollection, how easy it is to whip up to a degree of positiveness; once you're committed you become positive.

Now, that raises a very strange factor in this case. If Mr. Janecek and Mr. Wheeler are to be believed, that this device hadn't functioned, somebody, someone, against the rules and instructions of the company, went over to that device and tripped it by hand before 4:30 when Mr. Beguelin got there. I don't think from the evidence for a moment that there's any inference that is what happened. I think the evidence is overwhelming that Mr. Beguelin told the truth, that Mr. Wheeler was mistaken, and that Mr. Janecek might be termed somewhat more than merely mistaken. I don't think for an instant Mr. Janecek had that recollection in his mind for a year and a half and decided to disclose it on the



stand, and I don't think Mr. Kelley does, and he didn't argue it. [417]

If you discard him as completely unreliable in that regard, you have the question of Mr. Wheeler, and I'm willing to give Mr. Wheeler the benefit of the doubt. This thing was talked over and over, what did you see and what didn't you see. It became more important that that thing was closed. His recollection began to assume the state that was desired. If the thing is helpful to our friends, and so forth, it's a pretty rare animal that's entirely uninterested in reconstructing the facts. If he had said to Mr. Fullmer "I went to the engine at 2:30, this device hasn't been operated, and no one has been near it" it wouldn't have been operated at 4:30. That's the issue in regard to the evidence as to the operation or non-operation of the Pickering device.

Now we get to the next thing, as to how this thing stopped, if it stopped at all, by the operation of the butterfly valve, and we are confronted with some very remarkable situations. Their theory is the butterfly valve brought the engine down to an idling speed. All right; if it did that it must have been set in motion by something. The first thing that should set it in motion was the pulling of this handle to this wire. What is the testimony on that? Immediately this increased speed was observed up there, Mr. Janowski and Mr. Leitner knew what their duties were; they started posthaste for this spot, and they both arrived there simultaneously,

practically, and I think Janowski said "We both pulled it [418] up together," and they were scared; things were moving, they weren't going to fool around with it. What did they do? They pulled it a foot or a foot and a half in the air. The testimony is undisputed that that's hooked to a taut chain that hooks into this arm of the valve with a pin, oh, four or five inches long. What happened to that pin? The pin came up a foot and a half. That's a matter of physics, and there wasn't over an inch of slack in the wire. That meant that that permitted the butterfly valve to operate. How do they contradict that? They contradict it only with Mr. Janecek, who says the pin was back in the slot. Possibly, but not probably, the pin pulled up a foot and a half would ever go down and hit that hole again.

Maybe it was put back in, or maybe Mr. Janecek was mistaken on that, for this reason; they're bound and committed to stop this increased speed with the butterfly valve. All right; if this was pulled at the time Leitner and Janowski, their own witnesses, say it was pulled, all this damage would have stopped and wouldn't have occurred if the butterfly valve had operated, and they say it did operate, it had to operate. They're forced back to the conclusion that what happened was this thing didn't operate, not the butterfly valve, but the trigger. They're forced to the conclusion that though Leitner and Janowski pulled it up a foot and a half, the pin never came out of that slot. You've either

got [419] to believe Leitner and Janowski didn't know what they were doing—that was incredible; the machinery was going, they were scared; he gave it a second yank, and he could feel it come with the pressure up. Of course they were going to pull that out. That alone doesn't save them.

Here we've got the Brownell stop, that operates automatically. It is set at 250 RPM's. If it had operated it would have operated before the machine was throwing the pulp three feet in the air. What happened there? Well, it didn't operate. Why not? There isn't a word of testimony that it was defective or it was ever found defective. What it is is a spring tied in there under compulsion, tension. As the wheel speeds the centrifugal force pushes this plunger out, as a matter of mechanics and physics. This other object, the trigger, is set out here; you set that the distance you want it to trip when you reach a certain speed, and there isn't any escape for it. The thing goes out, the thing is there, they hit, and they did it right after; they tried it, it tripped, worked every time. There isn't a speck of testimony as to how in the world it could have failed, but they've got to assume it failed, because if it operated and the butterfly valve operated after these two devices set it off, and brought the engine down to idling, it would have done it long before the damage was occasioned, so in desperation, to find some other means to stop this engine, they finally come to the [420] conclusion, well, possibly at the end of everything, the driven pulley breaks,

and this belt begins to flop and has some leeway in it, and it comes down and hits the trigger that should have been hit by the plunger coming out on the wheel, but they don't account for why it hasn't hit it. That fortuitous and accidental event came down and promptly brought everything to a close.

Without any testimony to controvert that sequence of events, it's so highly improbable as to be incredible. Now, it does make a logical picture, looking at it from the defendant's picture, yes, Mr. Leitner and Mr. Janowski pulled that chain a foot and a half, it came out; yes, Mr. Brownell's stop pushed out as he should and he hit this trigger just as he should, but the trouble was not with these two devices. The trouble lay back in the butterfly valve itself, and when the devices caused it to operate and the arm on the butterfly valve over here, the weight, to come down and should have shut off that engine, and that occurred early in these proceedings, the minute Mr. Janowski and Mr. Leitner touched that handle, the minute this wheel got to 250, the butterfly valve arm came down, but what happened? It had gotten packed, and stuck in the packing, and it failed to close sufficiently, so that the volume of steam still coming through under there permitted it to go on and increase in speed, and that's the testimony; it's their own testimony. [421]

After this had been pulled what did the boys say? They didn't know any of the mechanics or the legal implications; they were just telling the truth. "I yanked that up, and I yanked it up, and the ma-



chine kept going on." What did Mr. Beguelin again say? He said "Yes, sir, we got that in there and we found it didn't close as it should; it was only about 90 per cent efficient." It let enough steam come through there to continue to operate that, and without a load on it, by that time the clutches were being thrown, and the line shaft is breaking; what happened? The Hartford boys said "That's all right, let's find out." They took the valve off; they looked at it; they found it stuck in its casing; they said "Let's see what that will do"; they put it back in the engine, turned on the steam; they let it get up until the Brownell stop had tripped, they heard it trip, and the machine kept right on going, and Mr. Wheeler himself says "Yes, I was on the throttle; I had to shut her down to keep her from running away"; so they said "Let's leave her down and try again," so they left the butterfly valve down and tried again, and turned on the steam, and the engine started right up and started to go away.

That's consistent with what we must know, the honesty of these boys. If there had been a question as to whether any witness got there and pulled that thing, there'd be some testimony the Brownell was in a broken condition, and hadn't [422] operated. No, the Brownell stop was right there, the minute they tried it on the 5th she worked, she worked ever since; there's no reason suggested why in the world it shouldn't work, so it brings it right back to the fact that the butterfly valve itself was defective, but that's not anything covered under this policy. There



wasn't any accidental breaking. There was merely an accumulation of stuffing and sticking in that valve, which is purely a matter of maintenance of their own department, but from the sequence of events as I say, setting it into the whole, that's going to account for everything in this with the one exception of Mr. Janecek's testimony.

Everything else can be accounted for except his statement that immediately afterward he saw it hadn't operated. If this sequence took place, the handle was pulled, the Brownell stop worked, but the butterfly valve failed to operate, and the machine kept going on, then by the process of elimination there's absolutely nothing else that could have stopped that engine or brought it to idling speed but the operation of the Pickering stop. Now then, we know from the physical facts when this belt broke, which we never have known before. Nobody has known before. We know now. It is an inescapable conclusion that it broke at the end of the sequence of events, and was the motivating cause in bringing the machine back to idling and stopping the damage. [423]

Well, of course, if that's so, the damage wasn't directly caused by the breaking of the belt, assuming the belt was part of the machine, which we don't dispute, and that that breaking was an accidental breaking, the damage couldn't have been caused by it, because the damage had all occurred prior to it, and it was the breaking of the belt itself which brought the machine down and slowed it up.

Now, I think the conclusion is inescapable that this machine started up, got going somewhat fast, the line pulley upstairs broke first, the rollers were released, which took some of the load off this engine, made it possible, probably, for this butterfly valve to fail to function; if all the load had stayed on maybe the butterfly valve would have functioned and brought it to a stop, but with the release of the machine through the throwing of clutches, with the breaking of the pulleys, of course that released all the machinery on the line shaft, the machine was pretty free to go, and the butterfly valve let it go, and the machine would have been going yet, in pieces, if it hadn't been for the intervention of the Pickering device that brought it to a stop. Now, the tests made out there on the 3rd, let's see, will they stop this machine as it comes down? They weren't interested any longer in the set screw pin. They could just as well have operated that wholly by hand. When they got down into the valve they found that the power was going through and that it brought it [424] to an idling speed, consistent with the testimony of the people in the boiler room right after the accident, the engine was down to idling speed and wasn't completely stopped.

Looking at it from that point of view, the burden is on them to sustain, by the preponderance of the evidence to show that the breaking of the belt was the direct cause of the damage. The case they built up to show that consists of an assumption that the belt broke at the beginning, uncorroborated by any

evidence, an assumption that the breaking of the belt then caused the overspeed, that the Pickering device failed to work, that the overspeed then continued, that the pulling of the pin by their two employees failed to work, that the Brownell stop failed to work, that finally a belt came sliding out of the no-where, hit the trigger, and the butterfly valve brought the engine down to a stop.

Contrary to that, as I say, is the uncontradicted physical proof that the butterfly valve was worn, defective and stuck; in twice checking that it wouldn't bring it down, the almost inescapable belief that Janowski and Leitner must have pulled that trigger far enough to drop the butterfly valve, the undisputed evidence that the Brownell was in good working order, and would have stopped the machine, the testimony of Mr. Beguelin, who made the Pickering, that at 4:30 it had operated, and against the whole thing you've got Mr. Janeczek saying "Well, I'll cinch this case; I saw it [425] immediately, and it hadn't operated"; and you've got good intention of Mr. Wheeler, who's talked it over so many times, that he saw it and it hadn't operated.

Outside of those two tiny pieces of human testimony everything else fits into the theory that this Pickering stop happened at the end of the sequence and not the beginning.

(Whereupon, at 12:15 o'clock p.m., the Court took a recess in this cause until 1:45 o'clock p.m.)

Spokane, Washington

Friday, October 10, 1947, 1:45 o'Clock P.M.

Mr. Paine: Just in passing, if your Honor please, the case Mr. Kelley cited this morning, the case from the 8th Circuit, as being close in point of fact, all I could tell from the argument was that it was a case involving an accident in which there was a policy with a similar provision. It was an action on machinery insurance against accidental breakdown. Whether the breakdown of the generator was accidental or whether it occurred while the generator was undergoing an insulator breakdown test was a question for the jury. They tested it to see if its insulation would stand up; the insulation didn't stand up, and the thing was injured, and caused an accident; other damages [426] followed from there. The question was whether the generator was in use or whether it was being tested prior to being put in use, which was an excepted condition from under the terms of the policy. I think the case has no similarity in its facts at all to the case involved here.

Now, turning to what I mentally called the legal argument in this case, instead of the factual argument, and without waiving for an instant or weakening for an instant in the position I took this morning in regard to the facts, because I think that is the controlling situation here and one in which we have complete confidence, but I think your Honor is entitled to a full statement of any other positions the company might have, I don't want you to mis-



construe for a moment that I don't have complete faith and confidence in the position taken this morning, which would dispose of the case if your Honor's disposition was favorable to us, which would dispose of the necessity of passing on any of the legal questions involved.

The first thing that I want to be sure is clear is that the failure of the safety devices, or the overspeeding that was referred to of the engine, neither of those are within the terms of the policy of themselves accidents. Of course, the overspeeding of the engine is merely a result of something else, a condition that exists, and insurance could or could not, I presume, be procured for any damages caused by overspeeding [427] engines, in which event the cause of the overspeed would be wholly immaterial; all you'd have to prove would be that your engines did overspeed and caused damage, and under such a policy why, you'd be entitled to be reimbursed. It probably would be a rather hazardous type of insurance to write, because the overspeeding could be brought on by the men themselves or the operations of the machinery. At least, as far as I know, I don't know what the premiums would be, but this is not such a policy.

This is a policy which insures payment for property damaged by an accident to an assured object. Now, the accident that plaintiff is predicating his case on is the breaking of the belt, as I saw it. There was some language, as I say, in Mr. Kelley's closing portion of the argument that what really happened is that the safety devices failed, and I



rather assumed that possibly he wanted the Court to draw the inference from that that if he had shown the safety devices failed, he would be entitled to recover under the policy, but he wouldn't be. If the safety devices failed because of a breaking of a part of the device that prevented it from functioning, if the arm on the butterfly valve or the Brownell stop had broken, and that had caused it to fail, that might be classified as an accident, but neither of the two devices which are alleged to have failed could in any sense be construed as an accident, because the policy specifically [428] exempts scoring, deforming, rupturing of the packing, because that's a common occurrence. If every time it got a little thick it was held to be an accident, that would be a common thing. There was no breaking, deforming or rupturing of the Pickering safety stop. The belt is the belt that drives the governor, and the Pickering safety stop, the idler pulley, idles on the belt. If there had been a breaking of the idler pulley that caused the stop to fail to function, a breaking of the stop mechanism, or if this trigger rod had suddenly broken so it couldn't operate, you might have had a breaking, but their only theory is the inference that the screw was loosened. A mere loosening of the screw isn't a breaking. That's a thing that's changed by the men, tightened, loosened, put in whatever position they want; a loose screw is no more a broken screw than a tight screw is, so we get back to the fundamental thing, which is the breaking of the belt, which is the accidental thing they're seeking to prove.

Assuming the belt now broke with the machine running at normal speed, on the afternoon of July 3, and just this belt broke; is that a sudden and accidental breaking, now, under the definition I read this morning? I'd like to read a short one from Couch on Insurance, Section 1137, Volume V:

“Expressions, terms and phrases which are frequently used, in one combination or another, throughout definitions of the word ‘accident,’ are: An event which takes place without one’s foresight or expectation”;

Well, the evidence here is that the breaking of these belts was well within their foresight and expectation; it was a common occurrence.

“An unanticipated happening”;

Well, this wasn’t unanticipated. Maybe the exact moment, nobody could have anticipated that at 1:45 it would break, but it was anticipated that the belts would break, and it was provided for their breaking, a device was provided to take care of their breaking.

“Undesigned; undesigned contingency; something unforeseen; something which occurs unexpectedly; an act which unintentionally and involuntarily occurs; something out of the usual course of events and which happens unexpectedly and undesignedly; not according to the usual course of things; not taking place as expected; involuntary; unintended; that which suddenly happens from an unknown and unforeseen cause.”

All the common expressions in the use of the word "Accident" contain in themselves the idea of something of a casualty, as Webster says, an afflictive nature involved [430] in it. Here they recognize the frequency with which these belts break; they have a device which prevents them from doing any damage if they do break, so they have these old belts around; if one breaks they pick another one up and put one on.

"Nor shall the depletion of material in any part of the object, due to pitting, corrosion or wear, be construed as an accident." The belt does not wear down completely thin and get thinner and thinner until it is wafer-like, until they finally part. The wear goes on with the constant flexing of this portion gathered together with the metal fastener as it goes over the pulley. There's a constant flexing of the portion by the metal fastener. The belt does not get much thinner, but it depletes the strength of the belt. Put one on, it will wear out and finally break. There's no accident in that; that's foreseeable and to be expected, the same as I put an automobile tire on my automobile, and I carry insurance from the accidental breaking of that tire; I might go out the first day, hit into a sharp stone, and the tire break, and I would be covered, but if I left that tire on and ran it until in the known and anticipated course of events the tire wore out, certainly no one would say the final wearing out of that tire was a sudden and accidental breaking of it, and in that sense, as far as this belt is concerned, it seems

to us in the first instance there isn't [431] any sudden and accidental wearing out of the belt; we don't know how many; they've occurred frequently. Every time one of these belts broke do you suppose they would consider they had an accident to an insured object, and send a bill to the insurance company for a new belt? We'd simply be paying the maintenance charges on their belting, "We need another \$5.00 for a new belt"; that I think is perfectly absurd and perfectly apparent, that nobody would consider the belt itself breaking as an accidental thing. It was an expected thing.

Now, I tried to point out this morning that of course you could have an accidental breaking of the belt; if you put a new belt on there, a strong belt, and somebody went through and we'll say had a crowbar or a piece of something that hit the belt, and that sudden and unexpected pressure or force upon the belt caused it to break, I think you'd classify that as a sudden and accidental breaking. You might have a new belt, and if you could show you put a new belt on, and the belt had a sudden and latent defect that wasn't known or expected, and that caused the belt to break, there again you might have what would be classed as an accidental breaking. Here there's no proof we put a new belt on and it was in good condition and somebody hit it or it had a latent defect. All they said "We have them hanging around, and whenever we change a belt we go over and put one on." Why? Because they've got a device installed to keep [432] them from having any serious results when that happens.



The Court: Under your construction of this policy, then, this insured was covered only for accidental breakage of the engine or parts of it by violent external means, is that correct?

Mr. Paine: Oh, no——

The Court: Well, every part of an engine that isn't absolutely new is partly worn, so under your theory there couldn't be an accidental internal damage of any part unless it was absolutely new, because it would be worn, and that would be responsible for its giving 'way.

Mr. Paine: No, as I say, if it wasn't usual and expected. If this flywheel had broken, maybe it was worn, it isn't a readily expendable part; had the main drive wheel broken, had any of the other things on the engine broken from the steam pressure on it, I'd say it was a sudden and accidental breaking, unless it was in the nature as shown here, that it was an expendable part that was usual and expected that it would wear out, and then they could come in and show that the breaking of that belt was an accidental one, not one just from continuous use, the burden being on them, and they could come in and show that, then they could show that they had an accidental breaking of that belt.

Now then, assuming, however, that there was an accidental breaking of the belt, we feel that the damage was not [433] directly caused by such accident. Now, the authorities are to the effect that "directly caused" as used in insurance policies such as this, are synonymous with "proximately caused" in con-



nection with acts of negligence, and where you're attempting to determine the proximate cause of an ensuing result. It is said in the case of *Dixie Pine Products Co. vs. Maryland Casualty Co.*, 133 F. 2d 583:

“It is well settled that the words ‘direct cause’ ordinarily are synonymous in legal intendment with ‘proximate cause,’ a rule applicable to causes involving the construction of an insurance policy.”

In other words, the courts have said that where you use it instead of using the words “proximately caused,” “directly damaged” and “directly caused” are in effect the same thing. That means that the chain of causation which is started by the initial breaking of some portion of the engine, assuming for the sake of this argument only that the belt broke first, and it was a new belt, and its breaking was fortuitous or accidental, that that breaking then must be the first in the line of causation to arrive at the ultimate result of the damage; that causation must follow through directly. As an example, you put up a line of dominoes and you hit this domino and it hits the next one, and so on; the last domino is caused by the blow on the first domino, because it has followed itself [434] through, but if there are any independent intervening causes, forces set up which intervene there to break that chain of direct causation, they make the original cause a remote or not a proximate cause.

Now, I agree with Mr. Kelley; we've done considerable research ourselves trying to find something on all fours with this case, and haven't been able to find anything too close on it. This Dixie Pine case from which I read this definition is, it seems to me, an analogous case on its facts; its ultimate conclusions—well, briefly, this is what the situation was: The Dixie Pine Company was a manufacturing company making some type of product in which they used a very highly dangerous and inflammable solvent which was carried through pipes in their manufacturing plant, and they had a policy of insurance against breakage similar to the one here. The pipes broke; there wasn't any question about that. The solvent escaped from the pipes; it was a gaseous or semi-gaseous type of material, and then over quite a little period of time the escaping gas spread to a boiler room where there was a fire enclosed in the boilers, and when the escaping gas came in contact with the fire it lit the gas and an explosion followed, and the loss was very extensive, and the question was whether the rupture of the pipe which was covered under their policy was the direct cause of the resulting explosion.

The court held in that case that it became a question of [435] fact for the jury as to whether or not proper care and proper efforts had been made to extinguish and get this fire out of the way of the spreading gas which it was known would cause an explosion did it come in contact with the fire; that if those efforts were not sufficient, or were negligent,

then there would be an intervening cause, that is, the failure to extinguish the fire and prevent the gas from reaching it, which would be the proximate cause of the explosion, and not the rupturing of the pipe which had merely released the gas in the first instance.

The case went up to the Circuit Court of Appeals and was reversed on that question, that it was a jury question, went back to the jury, went to the Circuit Court of Appeals the second time, and on the second time the court said that the facts adduced by the plaintiff showing that there was no fault in their inability to keep the gas from reaching the fire, and that therefore there was a direct cause between them, but had the facts been otherwise, there would have been an intervening cause which would have made the rupturing of the pipe in the plant a remote cause and not a direct cause directly responsible for the damage which resulted as a result of the explosion.

There's a fairly early case of *Cole vs. German Savings & Loan Society*, 124 Fed. 113, where a woman was injured in stepping into an unlighted elevator shaft, and a door was [436] open, and the question was that some strange child who had been permitted to come upon the premises had stepped in and opened the door or invited her to step into the shaft, and that the leaving of the door unlocked and the failure to light the premises were not the direct cause of her injury, but it was the intervening act of a third party which had permit-

ted this to take place. That type of case has been somewhat elaborated and distinguished on the theory that if in leaving your premises in that way, and there was evidence in this case, too, that the defendant knew that children or uninvited persons were around, and might do such a thing, then that becomes a foreseeable act in the chain, and still wouldn't keep them from being the proximate cause of the accident. There are a number of definitions cited as to what the remote cause or the proximate cause are:

“The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones.”

“The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. \* \* The casual [437] connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, ‘the intervener acts as a non-conductor, and insulates the negligence.’ The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although



it may have remotely contributed to the injury as an occasion or condition?"

Now, then, just one more before I discuss it fully many on the facts, from the *Harvard Law Review*, Volume XXXIII, Number 5, there's a very interesting article, "The Proximate Consequences of an Act." The gist of it, after discussing many of the phrases and the early history of the doctrine of proximate cause, is:

"If, on the other hand, where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from the defendant's act." [438]

Now, applying this language to this situation, as I see it, the defendant's active force in this case, which would be considered to be the breaking of the belt, that's the first direct active force, is the breaking of the belt, has come to rest in a position of apparent safety. Well, with the breaking of the belt what has happened? The rider pulley riding on the belt has dropped down. That's all that the breaking of the belt is intended to do; it's intended to release the rider pulley, and when the belt is broken and has released the rider pulley, the effect of the breaking of the belt has come to a position of apparent safety. The rider pulley is built, designed and constructed so that when the rider pulley drops, a condition of safety has been created. The court will



then follow it no longer, and if some new force later combines with this condition to create harm, the result is remote from defendant's act.

Now, what happened here? According to their own theory the rider pulley dropped; the belt's force had expended itself, as far as that's concerned; it had dropped the rider pulley. Up in the trigger arm of the safety device a screw had come loose or was loosened or something had happened to the screw, which thereupon prevented the safety device from operating. Certainly the belt breaking didn't prevent the safety device from operating. The belt breaking set the safety device in the process of operation. It was the intervening [439] act of failure of the set screw to properly bite into the arm or do what it was supposed to do, which is not a breaking within the terms of the policy, and not an accident within the terms of the policy. It's a mere matter of maintenance or negligence, a failure to maintain on the part of the company's officials or workmen. Mr. Wheeler said it's a rather hard place to get at and check and keep in proper condition, and we don't do it as often as we should. That's about his language as I remember it, but it was their duty to go around and keep this screw in a tightened condition. The screw wasn't broken under the terms of the policy, and yet it was, if we're to believe their statement, an independent intervening condition or act which prevented this Pickering safety device from operating, under their theory.

The Court: Under that theory it seems to me that if an insurance company can get the insured,

as they did here, to install a safety device for a part, then the insured could never recover for an accidental breaking of that part, because if the safety device worked, there would be no damage, and if it didn't work, there would be no proximate cause; is that the result of your reasoning?

Mr. Paine: No; they might not be able to recover for the breaking of a belt, but if the device was properly maintained and the safety device broke, this trigger arm had broken, or the ratchet had broken, or the spring up above, [440] if that spring had broken and that was the failure of the safety device to operate, why, you would have had a breaking of that part, which would have been the direct cause of the following damages, but if the failure of the safety device is not due to breaking, we don't insure against it any more than any other part of that machine may cause damage.

Supposing this had operated, and the question was on the failure of the butterfly valve to stop this machine; if that failure were due to the improper setting and maintenance of the valve in its packing, they would have damage to their machine and their machines upstairs, but it wouldn't be covered under our policy, which covers them from breaking. Now, had the damage resulted from the weight on the butterfly arm breaking off, or a portion of the butterfly valve breaking, and that had resulted in damage, then they would be covered under our policy, but they aren't covered unless there is a breaking, and if an intervening cause is

a cause from mere negligent maintenance without any breakage, the mere fact that it was preceded by something which broke, but which didn't cause the failure of the device to operate, why, there's no room for putting that liability back onto us.

The Court: You're arguing, then, that the negative matter of the failure of the safety device to operate constitutes an independent intervening cause; that's your position?

Mr. Paine: That's our position in that regard.

As this [441] article goes on to say:

"The form of rule above stated is believed really to state the true distinction and the one actually enforced by the courts. \* \* \* A more accurate phrase which is gaining in use is that the intervening force, unless it is to make the result remote, must be foreseeable."

By that is meant that if you start the chain of causation going and it's foreseeable that's going to follow through several different steps, then you have a direct cause. If something intervenes that isn't foreseeable, you have a remote cause.

Now then, you start this chain of events going by breaking the belt. What is the foreseeable result that's going to follow? The trigger arm is going to drop. That's foreseeable and expected. That's what the rider pulley is there for. The rider pulley is set to function to hit the trigger pin, and the trigger pin is going to operate on the pole, and the pole is going to turn the spring, and the spring is

going to drop the valve, and Rube Goldberg is going to get his money for the invention, but that's all the foreseeable events. In other words, the breaking of the belt, if the valve closed, and in closing damaged something, we'll say that that forced the pressure, steam, the sudden closing [442] of the valve caused too much back pressure on the steam, and that ruptured a pipe; that would be directly a result of the breaking of the belt, because that would be right foreseeable, that is, you would foresee that the belt would release the pulley, the pulley would hit the trigger finger, the trigger finger would turn this portion of it, that in turn would release the spring that would drop the valve, and if that did the damage then the breaking of the belt would be the direct cause of the damage.

What happens here is an intervening cause which is not foreseeable takes place. The belt breaks; you foresee the next stop, the dropping of the rider pulley, the pushing up of the trigger lever, and then an intervening unforeseeable and unexpected force comes in; there's a loose screw, and instead of this thing turning as it was expected and designed and intended to turn, it fails, and you then have an intervening, unforeseeable and unexpected cause entering into it, which then becomes the direct cause of the damage which follows.

That in its essence is the doctrine of proximate cause as near as I can figure it out. Of course there are a world of cases, automobiles, and all sorts of things, on it. I found nothing very close, but it is



stated that the real test is the foreseeableness of the causation, of the original cause following through, just as the first simple example, [443] you hit the first domino and you know from the way they're spaced that that force will tip the next domino over, and that they're so close that it will follow on down. If instead of that which was intended, down along the line somebody removed a domino, or it fell, and that force never continued to the end where that force was supposed to arrive to prevent something from happening, it wouldn't be the hitting of the first domino which caused the damage when the last domino didn't fall; it would be the removal of an intervening domino, because that would be the unforeseeable and unexpected thing that stepped in there to prevent the acting force from carrying through and accomplishing the purpose for which it was designed.

Here you've got the situation where you hit the first domino and the last domino falls; the purpose of that sequence is to prevent damage. Now, you hit the first domino; that is, you break the belt. It goes so far, and then due to something that has intervened and broken up the setup of the chain, it fails to be able to go through to the end and accomplish the result it was designed to accomplish. No one can say legally or logically that the breaking, or the damage which is caused by the failure of the last domino to fall over, was caused by the first domino being hit, because that was designed and intended that the last domino should fall. The damage



which was caused was by [444] the failure, or the removal of a domino in the row so that the active force set in motion did not get through to the place where it was designed to arrive, and it ceased to be a direct cause, but a remote cause of this process, and doesn't carry through to the engine; it doesn't carry through to the damage that ultimately was caused when it got through.

Now, my time is nearly up. I do want to call your Honor's attention to the fact that there are two portions of this policy, namely the original policy which covers property directly damaged by such accident, then there is endorsement number 1, which covers for use and occupancy, which is worded somewhat dissimilar from the first one, and I think there is a distinction that I should call to your Honor's attention. That policy is worded "caused solely," instead of directly, "caused solely by an accident to an object covered by the schedules," and on the back, the definition of object and accident as used in schedule 6 applies to this, so that here you have the question of the use and occupancy, which means that they will pay for each day of total prevention of business on the premises, caused solely by an accident to an object. Now there I think the distinction is twofold; it's a little stronger, more strongly expressed than the first, that if you might feel that the breaking of the belt and the loosening of the screw were both concurrent causes, rather than one being the proximate and one being the remote, that [445] they at least were concurrent

causes, then the use and occupancy provisions and the coverage would not be covered, because it is certainly not due solely to the breaking of the belt.

Also I think another part subject to interpretation is that the loss for each day's prevention of the business caused solely by an accident to an object means that the time that they are unable to carry on their business because of the accident to the object, in other words, the time necessary to repair the insured object that keeps them from operating. Well, now, in this case of course that is immaterial. The time to repair the insured object was only a matter of a minute or two; all that was necessary was to put back a belt, which was done, and the object operated; that is, at that time there apparently was no loose screw and they didn't even need to have the screw replaced because it proceeded to operate. Now, the basis of their loss of use and occupancy was the time it took them to replace a lot of un-insured machinery in the premises, which of course they could have had insured for breaking and loss of business; if they had had this same type of policy on the line shafting there wouldn't have been any question about it, the line shafting would have been paid for and the time out of business would have both been paid for. It didn't make any difference what caused the breaking. There might have been— [446] well, negligence on their part, but that would all have been paid for and the use and occupancy would have been paid for, because you would have had time out to repair insured objects that was a loss at the time of the accident, but they weren't worried about the

pulleys and the shafting; they carried their insurance on the engine, and the damage to the engine at the most was a dollar and a half, or whatever it cost to replace the belt, and the use and occupancy from the damage to the engine was a matter of minutes, and not a matter of a month, such as their bill totals, from the 3rd to the 29th of July; so that purely on the legal basis I think the company is entitled to recover, but I want to emphasize again in closing that primarily we feel that the factual situation that I argued this morning is such as shows conclusively that the breaking of the belt occurred at the close of the sequence, or very near the close of the sequence of events, and of course could not in any way be responsible for the damage which occurred prior to it, and caused the closing down or the bringing down of the machine to an idling speed, and there's no question then necessary for interpretation of the policy or any discussion of the legal rules, but I felt I should present to your Honor that subsequent phase of it in case your Honor might perchance differ on the factual basis of the case, and if so, I strongly contend and feel there isn't any real doubt on the legal interpretation of it, that the [447] breaking of the belt was not an accident as considered under the policy, but was the wearing out of an expendable article. Had that alone occurred no claim would have been entered. It was not directly responsible for the resulting damage; that intervening force was the failure of both of these safety devices, the butterfly valve and the Pickering stop, to operate—pardon me, the failure of the Brownell

stop on the wheel. They don't stop this machine by any of the devices they have on it. They stop it by the fortuitous accident of a piece of stray belting hitting it, so the failure of all their devices, none of which broke in the sense covered in the policy, were intervening causes and set up an intervening condition that was the direct cause of the damage, and made any breaking of the belt an indirect or remote cause.

The Court: I think you will have on that basis five extra minutes if you care to use them, Mr. Kelley.

### PLAINTIFF'S FINAL ARGUMENT

Mr. Kelley: Well, I haven't any set notion of the time it will take me, and I don't want to inconvenience or impose on the Court.

At the onset, I might say that I don't feel there's any necessity to use extra time to cite to the Court familiar horn-book law as to proximate cause, and in the second place, I don't think the Court is interested in any metaphysical [448] discussion of dominoes or anything else; what we're interested in is keeping our eye on the squirrel in this case. Before I advert to a few things Mr. Paine deems necessary to take up, I do want to say to your Honor that if I have not answered your Honor's question this morning, I felt that during the course of my argument I did, but in case I did not, I want the Court to know squarely my position, the plaintiff's position, in answer to your Honor's first question, which I felt went to the very heart of this lawsuit. As I



recall, you inquired "How do you know the Brownell overspeed stop didn't function normally?" I say to your Honor in addition to Beguelin's testimony that the safety chain arm was broke, in addition to the two men upstairs saying that they pulled the handle over there in exhibit 9 and the machine seemed to increase in speed, I say to your Honor directly this is our answer: Because the speed of the machine, the line shaft, and the pulleys, reached speeds which were not possible if the overspeed had functioned as it did under tests both before and after this accident. I call your Honor's attention to the testimony of the master mechanic, Beguelin, in that respect, a witness who was lauded by Mr. Paine as much as some of the others were vilified. He testified that he had overspeeded that engine to the tripping point of the Brownell stop some two or three months before the accident. He testified he had done that while it was connected with the [449] main line shaft.

He testified furthermore that all the material which was damaged by the accident of July 3, 1946, was running at the time that he made that overspeed test. Furthermore, his testimony coupled with Mr. Black's was that the Brownell, and this has never been controverted, disputed or denied, that the Brownell overspeed stop was set at 700 feet lineal for the paper, paper speed, to permit the practical operation of the standard newsprint if the mill were to run that. Now, if your Honor pleases, going to the second inquiry, I don't know if it was an in-



quiry by the Court, but at least an observation, you again went to one of the most salient points in the lawsuit, namely the testimony of Mr. Olinger, who testified that on a number of occasions on July 5 he had tried to work that idler pulley, and it hadn't worked automatically. Your Honor said "Well, apparently the set screw worked one time and apparently it didn't another," and I say to your Honor that's exactly what the evidence shows. I say to your Honor it is possible for a set screw to drag, to slip one time and hold another when it is perfectly tight.

Now, if your Honor pleases, it's very easy, it's very easy to cast aspersions at someone like Mr. Wheeler. I'm going to try to try the lawsuit, not the lawyers, but I'm within my rights, I feel strongly on it, that when any witness who sat here as Mr. Wheeler did, and your Honor observed [450] his demeanor and his reactions on the stand, and your Honor as an experienced trier of the fact and as an experienced trial lawyer before you went on the bench knows that there were many things that came out in that cross-examination that Wheeler testified to that he had never even gone over with his counsel before, and your Honor is fully cognizant of the fact that for seventeen pages in the record, by one of the most adroit and skillful cross-examiners at the bar, Mr. Wheeler told the story and told the truth, and I know your Honor feels that he was telling the truth.

Now, Mr. Olinger told the truth. The answer is simple. He didn't ask Mr. Wheeler what position he found it in, when he worked with Mr. Wheeler a couple of days after the accident, and Mr. Wheeler didn't tell him. Apparently he wasn't asked. Apparently he didn't tell anybody, there isn't any question about that. There isn't any question that Mr. McKeon, who came out here from the east, his advent out here changed the whole picture, the whole disposition of this insurance company. There isn't any question that after the session of August 4 there was still one question left to be unanswered, or to be answered—what was the condition of the governor after the wreck, that is, as far as the Inland Empire Paper Company was concerned, and we have their letter that I had them produce in open court, which they have from Mr. Black, which indicates when Mr. McKeon was here [451] there was one question left to be answered, that is, what was the condition of the governor after the wreck.

Now, the Hartford, or I'd better say Mr. McKeon, who came out here from the Hartford, wouldn't take the investigation of Olinger and they wouldn't take the investigation of Mr. Fullmer on that point. Now, since this morning's discussion I have checked the record with respect to what Mr. Fullmer had to say. Now, Mr. Fullmer, the representative of the Hartford, who was the first one on hand, or the second, he said that he looked at the Pickering stop, I believe it was July 7; in any event, a day or two after, he looked at the Pickering

stop. He said "The arm that trips the mechanism I could move," and he says "It was slightly loose." There's testimony in the record that I didn't call to your Honor's attention this morning, but I have checked and double checked it, and it's in the record. Now, instead of vilifying Mr. Wheeler, let's turn to his own testimony. Perhaps there's reason for Mr. Wheeler not running around telling Mr. Fullmer and telling Mr. Olinger at the time. He would have told him had Mr. Olinger asked him. Mr. Wheeler, your Honor will find it in his testimony, Mr. Wheeler testified, and I think it is indicative of the truth and veracity of the old gentleman when he testified in part on cross-examination: "Question: And do you go around frequently and tighten it up, keep it tight? Answer: Well, probably not as often as we should [352] have. I'll admit that on my own part, but those machines are in constant operation twenty-four hours a day, and a good deal of the time seven days a week."

I agree with council, human frailty being what it is, it may be that Mr. Wheeler is one of those rare people who just keeps his mouth shut when he should and speaks when he's asked. It may be that he was fearful some blame would attach to him, I don't know, but the point is, he told the full and complete story, and he told it under cross-examination, and he wasn't led by any suggestive questioning of counsel.

Now, with your Honor's permission, I want to ask, respectfully ask, that the Court will read that testimony of Mr. Wheeler which is the most impor-

tant in this case. I would impose upon the Court to ask that your Honor read it in toto. I know that you'll recollect all the testimony; I know that you'll recollect the testimony of Mr. Olinger on the point.

Now, coming to Mr. Paine's closing remarks, a remark that he made this morning, if there had been no automatic device on the Pickering governor and if the belt broke, that would be covered. Well, I stand with him on that, and I say "Amen," and I call your Honor's attention again to this case of *Ocean Accident & Guarantee vs. Penick & Ford*, and I don't want to arrogate to myself an exhaustive search of the law [453] and tell the Court that there is no other book on the point, but I simply say to your Honor that I have worked very hard, and I fail to find any other case that is as appropriate as this case. If it were contradictory to the plaintiff's case I'd cite it to your Honor.

In this *Penick* case the plaintiff brought an action, just as we are, on policy of machinery insurance issued by the defendant whereby it agreed to indemnify the plaintiff against loss from breakdown of certain machinery specified in the policy. I read the phraseology in the opinion of the Circuit Court of Appeals for the 8th Circuit, and I know your Honor checked the phraseology of the policy in the case at bar, and it's identical. In this *Penick* case the answer denied all the allegations of the petition, as all defendant insurance companies apparently do in a case like this, except to allege the issuance of the policy and the making of a proof of loss, but in that case they allege affirmatively that



the injury occurred while it was undergoing an insulation breakdown test. Some time during the day the generator was being operated it was decided to shut it down and call in the General Electric Company. The generator was then dismantled and a rotor was taken out and placed on blocks on the floor of the powerhouse, and when it was removed from the generator and placed on the floor it was inspected to ascertain if the weak spot in the insulation which a test [454] had indicated could be located, and just as in the case at bar, there was a breaking of a strap; it wasn't the same kind of a strap, no, it was a copper strap in the generator which came out of one of the slots on its way back to thread back into another slot. There was a rupture in the copper strap.

Your Honor understands why I cited that case this morning. Perhaps I should have emphasized it more. If I failed, then I seek to remedy it now. Counsel for the insurance company in that case stated in their briefs, which I have, and it's recited in the opinion of the Court, that one of the principal questions was whether or not the occurrence in question constituted an accident within the meaning of the policy, and that is, after all, aside from the metaphysical talk about dominoes and other extraneous matter, that's all Mr. Paine's been arguing this afternoon, assuming the belt was good, and assuming the break—under the state of the record, how could anyone assume otherwise? Fullmer said he cut off the end of the belt, and he cut it off to send it to Hartford. Don't you suppose if that belt



had been worn out or deteriorated, don't you suppose the Hartford would have had one or two experts here to testify it was weak and deteriorated? Of course they would. Assuming that piece, Exhibit 12, is the identical belt, is there any evidence of wear and decay on it? They might say we haven't got the whole belt. Is that our fault? The insurance company cut it off. [455] What part of the belt is in the record doesn't show any appearance of wear or decay, and Mr. Fullmer wouldn't so testify.

Now, in going back to this Ocean Accident case, the court said there was substantial evidence introduced by the plaintiff tending to support its claim that before the smoke test was applied there had occurred a breaking of the strap, and a fusing of the end of it to the rotor, and that this occurrence immediately caused some impairment of function. The breaking of the strap in the Penick case, and it is most appropriate in the case at bar—"This evidence, if believed by the jury"—if your Honor believes this belt was broken and that was the initial cause, and it was the "but-for" as we state, that caused the damage, then the court says:

"This evidence, if believed by the jury, warranted a finding of an accidental breakdown. We examine the record on this question for the purpose of determining whether or not there was substantial evidence, and we must accept as true the evidence supporting plaintiff's cause of action, and it is entitled to such reasonable favorable inferences as may fairly be drawn therefrom." (Citing cases.)

Then they say in that connection: [456]

“There is no evidence of physical facts or of scientific principle conclusively establishing that the separation of the strap and the fusing of the ends to the rotor must have taken place when the smoke test was applied. Whether the smoke test produced the injury was, we think, a question for the jury.”

And we maintain whether or no the breaking of this belt on the Pickering governor, was a question of fact which your Honor will decide as a trier of fact in place of the jury, and I might say parenthetically that it was with purpose, deliberate intent, that this suit was started first as a non-jury trial in the Superior Court and then removed to Federal Court, and no demand for jury was ever made. Why? Because we felt that a Court trained to analyze testimony, I don't attempt myself to arrogate any skill in these cases, undoubtedly counsel for the defendant can grasp a point in this field far more readily than I, but the witnesses have told the logical sequence, and I realize this, that a court will not be confused by the sand in the air that a jury would.

The court said:

“There was expert testimony based upon a hypothetical question, to the effect that the break in this strap would occur instantly. In determining the [457] meaning of the term ‘accident’ as used in this policy”——

and permit me to interrupt, you will remember the definition is the same as we have;

“——the question is not what it might mean to a scientist or one skilled in the subject involved, but what it means to the average man.” (Citing more Federal authority in the 8th Circuit.) “Unless some technical meaning was obviously intended, the words ‘accident’ and ‘accidental’ should be given the meaning they impart in common speech.” (Citing more authority.) “The testimony of the expert witness Drabelle that the vibration shown by the testimony”——

and your Honor will recall that in this case at bar on cross-examination the witness Wheeler testified “Yes, there was vibration that could shake that set screw loose”——

“——was not by design either of the maker of the machine or of the plaintiff and that it was not normal, expected or anticipated, but that it caused the break in the strap, is sufficient, we think, to show that there was an accident.”

The defendant insurance company in this Penick case made [458] the same contention as they’re making in the case at bar, that there was no impairment of function. In this Penick case they say:

“The policy provides that this impairment must manifest itself ‘by immediately impairing the function of the object’ ”——

that's the terms of our policy, and must necessitate "repair or replacement before its functions are restored."

The court goes on to say in this case:

"Assuming, as we must, the existence of the break and that the break was accidental, the testimony conclusively shows that an impairment of function necessarily followed."

and that's the case at bar. Now, if your Honor pleases, I thought the third question that you addressed to counsel likewise went to the very heart of this lawsuit. You said "If the Pickering stop functioned" and they now maintain that it did, "If the Pickering stop functioned, why didn't the engine go to an idling speed?" I listened carefully. I could find no answer in either the morning argument or the afternoon argument of counsel, who contented himself by just making the bald statement that the Pickering governor was functioning.

Now, if your Honor pleases, it apparently is conceded that if the Pickering governor was not functioning there [459] should be recovery. I confess I'm at loss to understand the mental gymnastics which calls to your Honor's attention that we have to prove that the breaking of the belt disconnected the governing device. We don't have to prove any such thing. We have to prove that the breaking of the belt in the first place was the "but-for" but for which this accident would never have occurred.

He says we have to prove the engine increased speed. Their own witness Fullmer testified that the



tests resulted in an increase of speed. Now, if your Honor pleases, with respect to Mr. Wheeler's testimony, I just want to turn the same remark that counsel made concerning the employees of the company upstairs. He said they couldn't foresee a lawsuit at the time, so of course their actions were spontaneous and they pulled that safety. Now, how would Wheeler, a stationary engineer, foresee at the time that there was going to be a lawsuit, when on July 5 Mr. Olinger came and made the tests with him? Do you suppose for one minute, as a matter of common sense, that Wheeler secretly held this knowledge to himself because he figured that 'way in a year or two there would be a lawsuit on this policy? That's preposterous.

Now, if your Honor pleases, there is no evidence of wearing out of the belt. There isn't any wearing out of the belt, and as your Honor put the question, there couldn't be, under his theory, any accidental breaking here unless a part [460] was new. In other words, viewing it, as we say "reductio ad absurdum" under their theory the insurance policy didn't insure, under their theory they're only insured against the breaking of the strongest part of the Sumner steam engine, i.e.; such as the fly-wheel pulley, but that isn't the case. The policy also insures against the breaking of the weakest part, such as the governor belt, and I say to your Honor a chain is no stronger than its weakest link. If the governor isn't a part of that steam engine, if the belt isn't a part of that governor, why, then my argument falls to nothing, but that is not the case.



Now, according to an insurer's theory, the butterfly valve was controlled by the Brownell overspeed, and the safety hand chain, and if the Brownell had not worked, and if the hand safety chain hadn't been used, the insurer wouldn't pay, simply because all the control devices were not used. In other words, if the hypothetical case Mr. Paine put, if someone had not braved the flying debris to turn off the butterfly valve by hand, assuming that it hadn't tripped, as is most probable, and the weight of the evidence indicates, by the belt being in such juxta-position with the trigger, within a half an inch, assuming for the nonce that didn't happen, under their theory the engine itself could have exploded and yet the insurer would have escaped payment because the strongest safety device hadn't been tripped. [461]

The policy doesn't say that. If it did it would be against public policy, because it would invite deliberate fraud on the part of the insurer. They could always be recommending these safety arms to be put on, and its inspectors could be instructed to adjust the overspeed stop at such a high point that it would never be reached before the engine exploded. Now, that's where you get to under their theory, and that isn't the case at bar.

If your Honor pleases, Mr. Wheeler's testimony, Mr. Olinger's, Mr. Fullmer's testimony, and this Ocean Accident case, should resolve this case as prayed for. I purposely refrain now from being drawn into a by-pass upon the use and occupancy provisions. We've stipulated on the amount of dam-

ages; we've got plaintiff's exhibit 14; I don't intend for one thirty seconds to weaken our strong position by discussion on damages. We've stipulated on that. I'm not going to get into that. I say there is liability, and we've stipulated as to what the damage should be. I even went to the precaution to demand that debit item, so the court could have in detail what those items were.

### RULING OF THE COURT

The Court: It has never seemed to me necessary or very helpful to anybody to keep everyone in suspense in a case of this kind throughout long introductory remarks by the Court, so I'll say it is the conclusion of the Court that the plaintiff has failed to maintain the burden of proving that the damage shown to the machinery in this case comes within the terms of the policy of insurance.

I don't propose to make any extended or exhaustive review of the facts or the evidence in this case. I'll merely try to say enough to give you and perhaps the Appellate Court the basis for my conclusion, and enable you to draft the findings of fact that will be entered by the Court in this case. I have often instructed juries that they should keep their minds free and open and not reach any conclusion as to the facts until the case is submitted to them. I've found that it isn't so easy to follow that instruction when I have to act as the trier of the facts, but I can say truthfully that I have done it in this case.

I've been greatly puzzled in this case as to how this accident could possibly happen in the way that the evidence, the physical facts, seemed to indicate that it did, and I was rather in a state of uncertainty until the very conclusion of the case. After giving it a good deal of thought I have come to the conclusion that the probabilities [463] weigh, it seems to me, very heavily in favor of the defendant in the case on the facts as to just how this damage originated and what was its cause.

Aside from the legal theories advanced by counsel for the defendant, according to their own theory of the case, in order to prevail, the plaintiff would have to prove at least that the Pickering governor belt broke; that as a result of that breaking the number 4 engine speeded up, and as has been said here, "ran away"; and that speed accelerated to the point where it was communicated through the main drive belt to the line shaft, and the machinery attached to the line shaft, on the upper floor, reached a speed that caused the pulleys to disintegrate through centrifugal force, or as has been said here, caused the pulleys to explode.

Now, under that theory of the case it seems to me that that runs counter to and collides with a number of the physical facts here, the probabilities to be deduced from the physical facts, or from facts that are uncontroverted, or at least have been proven convincingly to the satisfaction of the Court. We have to assume that if that happened, that three separate and to a certain extent independently operated safety devices failed to work. First of all

we have to assume that the safety stop on the Pickering governor, operated by the little pulley that is in contact normally with the belt that broke, that that failed to work. There [464] is, true, evidence here of Mr. Wheeler and Mr. Janeczek that shortly after the accident they observed the engine and saw that that stop had not operated, but taking that testimony at its full value, if that happened, if the Pickering stop failed to work, then of course the governor would be inoperative, as has been said, the balls would fall down and the steam vent would be wide open, the steam control, and the engine would proceed to run away.

If it did so, then of course when it reached the speed at which the Brownell stop was set on the flywheel, and it's a very simply operating device, it is simply a weight held off by a spring; when centrifugal force overcomes the resistance of the spring the arm goes out and trips the trip that is nearby there, and will be reached by the protruding arm when that has occurred. It's a very simply tripping device that even I can understand, and sometimes I feel that I'm so lacking in mechanical ability that the mechanics of a wheelbarrow almost appall me, but I can understand that trip. Now, why didn't it operate? It was set to operate before it would reach any speed that would cause the pulleys to explode, or anywhere near that tremendous speed.

There hasn't been any explanation as to why it didn't work. There has been shown to have been no defect in it. It hasn't been shown to be out of



order. Every time, as I recall, there was any evidence about its testing, it worked, [465] both before and after the accident; so we have to assume that didn't work. We also have to assume, which has been pointed out here as rather improbable, to me, that although this hand safety stop had been set up, connected with a chain to the butterfly valve extending up into the upper room, where the paper machine was operating, a convenient handle in the floor, the men evidently had been instructed about it, knew it was there, and when this evidence of speeding was noticeable they ran over and they pulled that, and no doubt pulled it violently and in a way that should have made it work. Now, we have to assume that that didn't work, and then we have another point here.

It's true that these tests that were conducted by the representatives of the insurance company were over a period of time after the accident, extending up into August, but so far as the matters which they were examining in their tests are concerned, there hasn't been shown to have been any change in the particular item or device from the time of the accident until the test was made, and their tests indicated both by an examination in the shop of the butterfly valve and by putting it back on the engine and operating it, that the butterfly valve at the time of this occurrence was in such a defective condition that it not only would not stop the engine, but wouldn't even reduce its speed to the idling speed, because of the packing having [466] cor-



roded or something of the sort, the little damper that operated in the pipe didn't work, didn't close all the way down, there was three quarters of an inch or so of play when it was supposed to be closed, and both from a standpoint of examination in the shop and by actual test operation of it when it was put back on the engine, when the butterfly valve was supposed to be closed the engine would continue to accelerate.

Now, both the Brownell stop and the hand stop up above operated on this butterfly valve. If that's the only thing that tripped, the Brownell or the one upstairs, either of them, the engine wouldn't have come to an idling speed; it would have continued to run away, yet the undisputed evidence is that when the first employees of the plaintiff reached the engine after this accident, the engine was idling. It was not stopped, but was idling, as has been pointed out here, with practically all of the load removed, because by that time the whole shaft had been thrown out, the main drive belt was off of the driven pulley, at least, and there wasn't any load on the engine, it was running free.

Now, I realize that a conclusion reached from the logic of those facts runs counter to the testimony of two of the witnesses here, Mr. Janecek and Mr. Wheeler. Mr. Janecek seems to have been rather slighted in the argument, to a certain extent. I see no great difference between Mr. [467] Janecek and Mr. Wheeler except that the interval was a little longer during which they didn't report what

they undoubtedly now feel that they had seen at the time of the accident. I think Mr. Janeczek is an honest witness, but I know what lapse of time and self-interest, and wanting to believe a thing a certain way, will do to fallible human memory when we try to reconstruct something that has happened in the past, and it is just my view of it that because of the what seems to me unanswerable logic of the facts that I have detailed here, that both Mr. Janeczek and Mr. Wheeler have just let themselves indulge in some wishful thinking, and must have been mistaken about the situation, or the position of the Pickering stop at the time they observed it.

I think that's probably all that I need to say. I can say this, that I'm convinced that neither side in this case, I think this case has been very fairly and very ably presented from both side, and I don't think either side has either fabricated or attempted to fabricate any evidence here. Of course, I make allowance on both sides, because we have no disinterested witnesses except possibly Mr. MacCamy, I would say Mr. MacCamy is, but as I say, I don't think there's any disposition here to try to fabricate evidence. I think both sides could have done a better job if they tried to fabricate it.

Mr. Paine: I think if we had put our minds to fabrication [468] we could have improved it.

The Court: Exception, of course, is allowed to the plaintiff if it is necessary, and the matter of settling the findings can be taken up in the regular way.

## Reporter's Certificate

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on October 7, 8, 9, and 10, 1947, at Spokane, Washington.

That the above and foregoing, consisting of pages numbered consecutively from 1 to 449, contains a full, true and accurate transcript of the proceedings had therein, including all objections and the court's rulings thereon.

Dated this 6th day of February, 1948.

/s/ STANLEY D. TAYLOR,  
Official Court Reporter.

PLAINTIFF'S EXHIBIT No. 14

Inland Empire Paper Company  
Manufacturers

Millwood, Wash.

September 17, 1946.

Telegraphic Address: Spokane, Washington.

Hartford Steam Boiler Ins. & Ins. Co.

707 Artie Building

Seattle, Washington

Attention: Mr. Fred Fullmer

Re: Policy #97-743

Gentlemen:

In accordance with your request we enclosed herewith our Claim for Loss which occurred July 3, 1946, under this policy.

Please give your usual prompt attention to this claim.

Very truly yours,

INLAND EMPIRE PAPER  
COMPANY,

By C. A. BUCKLAND,  
General Manager.

CAB/h

Encs

(Received Seattle Sep 18 1946 H.S.B.I.&I. Co.)

(Received Sep 21 1946 Claim Dept. Hartford,  
Conn.)

## Debit Memorandum

From Inland Empire Paper Company

Millwood, Washington,

September 12, 1946.

To Hartford Steam Boiler Ins. &amp; Ins. Co.

707 Artic Bldg.

Seattle, Washington

We debit your account as follows:

Overspeeding Engine No. 4 Accident, 1:45 P.M., July 3, 1946	
Use and Occupancy, see sheet A and A-1.....	\$7,350.00
Repair Labor, straight time, see sheet B.....	2,524.57
Repair Labor, premium time, see sheet B.....	321.19
Miscellaneous Repair parts drawn from Store Account, see Foreman's Requisitions, attached.....	448.54
Miscellaneous Repairs, not accomplished, see sheet C....	410.42
Loss of Fourdrinier Wire, see sheet D.....	198.52
Belting of Drives, see sheet E.....	280.74
Union Iron Works, invoice 360566.....	4,623.77
Supervision and overhead.....	16.06
	<hr/>
	\$16,173.81

Misc. In. ....	7,366.06
Belting .....	280.74
Store .....	5,482.73
Wires .....	198.52
Rep. Lbr.....	2,845.76

INLAND EMPIRE PAPER  
COMPANY,

Per CAB

Received Seattle, Sep. 18, 1946. H.S.B.I. &amp; I. Co.

Received Sep. 21, 1946, Claim Dept., Hartford,  
Conn.



## SHEET A

July	3, 1946	1:45 P.M. to 12:00 M.	.....	0.00 hrs.	*
	3	12:00 M. to 7:00 A.M.	.....	0.00 "	Holiday
	4		.....	0.00 "	Holiday
	5		.....	24.00 "	
	6		.....	24.00 "	
	7		.....	0.00 "	Sunday
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	12		.....	24.00 "	
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	18		.....	24.00 "	
	19		.....	24.00 "	
	20		.....	24.00 "	
	21		.....	0.00 "	Sunday
	22		.....	24.00 "	
	23		.....	24.00 "	
	24		.....	24.00 "	
	25		.....	24.00 "	
	26		.....	24.00 "	
	27		.....	24.00 "	
	28		.....	0.00 "	Sunday
	29	Resumed operations 7:00 A.M.			

---

 480.00 hrs.

480 hours is 20.00 days  
24

(Received Seattle Sept. 18, 1946, H.S.B.I. & I. Co.)

(Received Sept. 21, 1946, Claim Dept., Hartford, Conn.)

## SHEET A-1

## Use and Occupancy

Production: Constant: based on average experience.

No. 2 Machine.....	62.00 tons
No. 3 Machine.....	15.00 tons
No. 4 Machine.....	25.00 tons
	<hr/>
	102.00 tons
 25.00	
<hr/> 102.00	is 24.5%.

Therefore, No. 4 Machine represents 24.5% of Total Machine Room Production.

Time Loss: No. 4 Machine, from Midnight\*, July 3rd, to 7:00 A.M., July 29th (see sheet A), 20 operating days.

24.5% of % 1,500.00 x 20 is \$7,350.00

\*U & O starts at first midnight

(Received Seattle Sep 18 1946 H.S.B.I. & I. Co.)

(Received Sep 21 1946 Claim Dept. Hartford, Conn.)

## Repair Labor on No. 4 Machine Special Account

July and August 1946

	Hours	Pay	O. T. Hours	Pay	Total Hours	Total Pay
Beguelin .....	143	\$229.52	21½	\$34.51	164½	\$264.03
ettis .....	84¾	110.18	13¼	17.23	98	127.41
Blew .....	65½	85.21	4½	5.85	70	91.06
sslinger .....	42½	55.80	6¼	8.18	48¾	63.98
Esslinger .....	55¼	64.09	¼	.29	55½	64.38
arlott .....	32½	38.61	3½	4.20	36	42.81
re Gebo .....	8	9.28	2	2.32	10	11.60
Horwath .....	59¼	80.28	7¼	9.83	66½	90.11
er LeFave .....	50½	68.43	6¾	9.14	57¼	77.57
y Lobdell .....	115¼	156.16	19¼	26.07	134½	182.23
Nelson .....	136¼	177.13	20	26.00	156¼	203.13
ence Owens .....	55½	56.61	9½	9.69	65	66.30
Palmen .....	150¾	195.98	8¼	10.72	159	206.70
Phelps .....	3½	4.06	1¾	2.03	5¼	6.09
Robie .....	22	28.60	3	3.90	25	32.50
Shollenberger .....	8	10.40	2	2.60	10	13.00
Stewart .....	122¼	165.65	13¼	17.96	135½	183.61
rd Stewart .....	47½	55.10	9¼	10.73	56¾	65.83
Stuck .....	89½	103.82	12¼	14.21	101¾	118.03
s Taggart .....	93¾	108.75	8¾	10.15	102½	118.90
y Tesch .....	91¼	118.63	15½	20.15	106¾	138.78
Tesch .....	45¼	61.31	6½	8.81	51¾	70.12
Verece .....	95¾	111.07	8¾	10.15	104½	121.22
Yates .....	110¾	150.62	21	28.67	131¾	179.29
umper .....	44¾	45.64	6¼	6.70	51	52.34
arbert .....	37	37.74	5	5.27	42	48.01
Henson .....	8	8.16			8	8.16
rt Beguelin .....	16	16.32	1¾	1.81	17¾	18.13
Bierce .....	20	20.40	1¾	1.81	21¾	22.21
league .....	8	8.16			8	8.16
Stafford .....	3	3.06			3	3.06
Bailey .....	58¼	59.47	5	5.10	63¼	64.57
Hanshaw .....	16¼	16.58	5	5.48	21¼	22.06
er Herrmann .....	5	5.10	1½	1.63	6½	6.73
Connell .....	4½	4.59			4½	4.59

	Hours	Pay	O. T. Hours	Pay	Total Hours	Total Pay
R. C. Davis.....	2	\$2.04			2	\$2.04
R. Barrett .....	29	29.58			29	29.58
W. McHarness .....	16	16.32			16	16.32
Ed Miller .....	5	5.10			5	5.10
Richard Korte .....	1	1.02			1	1.02
Total Hours.....	2,002.25		250.50		2,252.75	
Total Pay .....		\$2,524.57		\$321.19		\$2,845.76

cc to: JOS JLJ

(Received Seattle Sep 18 1946 H.S.B.I. &amp; I. Co.)

(Received Sep 21 1946 Claim Dept. Hartford, Conn.)

## SHEET C

## Miscellaneous

4—#A-46 Steel Sash .....	15.00	\$60.00
80—14" x 20" Glass for above.....	.62	49.60
1—A-46 Steel Sash .....		15.00
8—14" x 20" Glass for above .....	.62	4.92
1—A-46 Steel Sash .....		15.00
14—14" x 20" Glass for above.....	.62	8.68
1—A-46 Steel Sash .....		15.00
10—14" x 20" Glass for above.....	.62	6.20
1—Steel Sash .....		15.00
12—14" x 20" Glass for above.....	.62	7.44
To glazing 124 lights.....	.06	7.44
1—6" x 9" Oil Glass, #3 Machine.....		1.28
To repair of spare Governor.....		24.61
Booster Motor Pulley, not replaced.....		162.85
54 ft. Hot Air Conduit, repair.....		17.36
		<hr/>
		\$410.42

(Received Seattle Sep 18 1946 H.S.B.I. &amp; I. Co.)

(Received Sep 21 1946 Claim Dep. Hartford, Conn.)

## SHEET D

Lindsay Fourdrinier Wire #89207..... \$324.38

had run 17 days at time of accident

Previous ten Lindsay wires ran

21 \* days

49

49

61

42

53

47

39

46

31

or an average life of 43.8 days

43.8

17.0

---

26.8 days loss of normal life

$\frac{26.8}{43.8}$  is 61.2% loss of normal life

61.2% of \$324.38 is ..... \$198.52

\*damaged by deckle

(Received Seattle Sep 18 1946 H.S.B.I. Co.)

(Received Sep 21 1946 Claim Dept. Hartford, Conn.)



## SHEET E

## DRIVES:

Wire		
40' 2" 8" x 6 ply Crackerjack Belting.....	1.105	44.39
Dryer		
38' 2" 8" x 6 ply Crackerjack.....	1.105	42.18
Stack (spliced only)		
28' 8" 8" x 8 ply Condor.....	2.158	61.86
3rd. Press		
40' 6" 6" x 5 ply Challenger.....	1.105	44.75
2nd. Press		
39' 8" 6" x 5 ply Challenger.....	1.105	43.83
1st. Press		
39' 7" 6" x 5 ply Challenger.....	1.105	43.73

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 \$280.74

(Received Seattle Sep 18 1946 H.S.B.I. &amp; I. Co.)

(Received Sep 21 1946 Claim Dept. Hartford, Conn.)

All Claims for Allowance Must Be Made on Receipt of Goods.

No Exchange or Express Charge Allowed on Remittances.

Office and Works—Montgomery Avenue and S.F.& N.Ry.

Telephone Glenwood 2711 Box 2135

Iron Works, Manufacturers of Mining, Smelting and Sawmill Machinery

Agencies: Allis Chalmers McCully Crushers and Rolls

Worthington Compressors, Pumps, Motors, Etc.

Spokane, Washington Aug 7 1946

to: Inland Empire Paper Co., Millwood, Washington

Order No. 925. Our Order No. 360566. Shipped to..... Called.....

Terms: Net cash. Interest Charged on all Accounts after 30 Days

Cast Iron Taper Pulleys .....	13815#		
Cast Iron Sole Plates.....	679#		
Pair Cast Flanged Couplings.....	1784#		
Cast Iron Boxes 3 7/16" } .....			
Cast Iron Boxes 3 15/16" } .....	1992#		
Extra 3 7/16" Base } .....			
Special Overtime heats in Foundry.....	18270#	14.86	2714.92
Pcs 1½" Hex Cold Rolled x 4½".....	30#	10.08	3.02
Pcs 1" Cold Rolled x 7½".....	10#	8.78	.88
Pcs 1¼" Cold Rolled x 12½".....	26#	8.78	2.28
1" Hex Nuts.....		10.23	2.46
1¼" Hex Nuts.....		19.09	2.29
Key Steel.....	16#	10.53	1.68
Pc 3 7/16" Cold Rolled Shaft x 22'3" } .....			
Pc 3 7/16" Cold Rolled Shaft x 17'8" } .....	2421#	7.73	187.14
Pc 3 7/16" Cold Rolled Shaft x 14'8" } .....			
Pc 3 7/16" Cold Rolled Shaft x 22'2" } .....			
Pc 3 15/16" Cold Rolled Shaft x 22'0" } .....	2277#	7.88	179.43
Pc 3 15/16" Cold Rolled Shaft x 11'0" } .....			
Pattern Labor 48 Hours.....		2.50	120.00
28 Hours Straight time			
20 Hours Overtime			
Machine Work 510 Hours.....		2.50	1275.00
427 Hours Straight time			
83 Hours Overtime			
			4489.10
3% State Sales Tax.....			134.67
1946. O.K. MUB. Store.....			4623.77

Received Seattle Sep 18 1946. H.S.B.I. & I. Co.)

Received Sep 21 1946. Claim Dept. Hartford, Conn.)

## SHEET F

Supervision and overhead based on 5% of time  
and one-half paid to Repair Labor Crews

Repair Labor.....	\$321.19	
5% of 321.19 is.....		\$16.06

(Received Seattle Sep 18 1946 H.S.B.I.&I. Co.)

(Received Sep 21 1946 Claim Dept. Hartford, Conn.)

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for trial on the 7th day of October 1947 and having been tried before the court, a jury trial having been waived, William V. Kelley, of Witherspoon, Witherspoon & Kelley, appearing as counsel for the plaintiff, and Alan G. Paine, of Paine, Lowe & Coffin, and Franklin W. Stevenson appearing as counsel for the defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the court being fully advised in the premises, now makes its Findings of Fact as follows:

#### FINDINGS OF FACT

1. That on the 3rd day of July, 1946, there was in effect an insurance policy, under the terms of which the defendant, Hartford Steam Boiler Inspection and Insurance Company insured the plaintiff, Inland Empire Paper Company against loss from an accident, as defined in said policy, to a Sumner Steam Engine located in the basement of the plaintiff's paper plant, against loss on the property of the plaintiff directly damaged by such acci-

dent and against loss due to total prevention of business at said plant caused solely by an accident to said Sumner Steam Engine.

2. That an accident is defined in said policy as “a sudden and accidental breaking, deforming, burning out or rupturing of the steam engine or any part thereof, which manifests itself at the time of its occurrence by immediately preventing continued operation, or by immediately impairing the functions of the steam engine and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing, or shaft seal or diaphragm shall not constitute an accident, nor shall the depletion of material in any part of the steam engine, due to pitting, corrosion or wear, be construed as an accident.”

3. That on the 3rd day of July, 1946, while said policy was in full force and effect the said Sumner Steam Engine over-speeded due to some undetermined cause which did not constitute an accident within the terms of said policy and that as a result of this overspeed some uninsured [499] equipment of the plaintiff connected with said engine was broken and damaged and other property of the plaintiff was damaged by the breaking of said uninsured equipment; the total amount of said damage being in the amount of \$8,823.81, and as a result of said damage plaintiff was prevented from carrying on its business for a period from July 3, 1946 to July 29, 1946.

4. That before the Sumner Steam Engine had accelerated to a speed which would result in damage to said engine, the belt directly driving the Pickering Governor broke causing the Pickering Governor Stop to operate bringing the engine to an idling speed.

5. That there were two devices designed to operate a butterfly safety valve in the main steam line, one being a safety chain which could be operated by men working on the main floor above the steam engine, and the other an automatic device located on the engine-driving-pulley which operated by centrifugal force and that either one or both of said devices had operated and the butterfly valve had been closed before any damage had been done to the plaintiff's property, but that due to the fact that the valve stem was binding in its packing it did not completely close but allowed the engine to continue to accelerate until the engine was brought to an idling speed by the breaking of the governor drive belt and the operation of the Pickering Governor Stop.

6. That none of the damage sued for was caused by an accident to an object insured under the policy of insurance.

7. That the plaintiff was not prevented from carrying on its business because of an accident to an object insured under the policy of insurance.

8. That the plaintiff duly notified the defendant's agent of the occurrence as required by said insurance policy.



From the Foregoing Findings, the Court concludes:

CONCLUSIONS OF LAW

1. That the plaintiff has sustained no loss for which the defendant is liable under the terms of any contract of insurance between the defendant and the plaintiff and that the plaintiff is not entitled to recover anything in this action.

2. That the defendant is entitled to judgment dismissing this [500] action and to judgment for its costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated this 16th day of January, 1948.

SAM M. DRIVER,

United States District Judge.

Presented by

ALAN G. PAINE.

Copy received 10/27/47. W. V. Kelley.

[Endorsed]: Filed January 16, 1948.

[Title of District Court and Cause.]

### JUDGMENT

This cause came on regularly for trial on the 7th day of October, 1947, William V. Kelley, of Witherspoon, Witherspoon & Kelley, appearing as counsel for the plaintiff, and Alan G. Paine, of Paine, Lowe & Coffin, and Franklin W. Stevenson appearing as counsel for the defendant, the trial by jury having been waived by the respective parties, the cause was tried before the court, sitting without a jury, whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined and documentary evidence introduced by the respective parties, the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith.

Now therefore by reason of the law and findings aforesaid, it is hereby ordered, adjudged and decreed that the plaintiff take nothing by this action, and that the defendant have and recover costs herein taxed at \$142.60.

Dated this 16th day of January, 1948.

SAM M. DRIVER,

United States District Judge.

Presented by

ALAN G. PAINE.

[Endorsed]: Filed Jan. 16, 1948. [501]

[Title of District Court and Cause.]

ALTERNATIVE MOTION FOR A NEW TRIAL  
OR FOR ENTRY OF PLAINTIFF'S RE-  
QUESTED FINDINGS AND ENTRY OF  
APPROPRIATE JUDGMENT THEREON.

Comes now plaintiff, Inland Empire Paper Company, a corporation, and moves the court for an order to amend its Findings or make additional Findings and amend the judgment accordingly.

Without waiving the foregoing motion, and in the event the same is overruled, the plaintiff, Inland Empire Paper Company, moves the court to set aside decision and judgment and grant a new trial to the plaintiff upon the following grounds:

I.

Irregularity in the proceedings of the Court, or adverse party, or any order of the Court, or abuse of discretion, by which such parties were prevented from having a fair trial;

II.

Accident or surprise which ordinary prudence could not have guarded against;

III.

Newly discovered evidence, material for the parties making the application, which they could not with reasonable diligence have discovered and produced at the trial;

IV.

Insufficiency of evidence to justify the decision, or that it is against law;

## V.

Error in law occurring at the trial and excepted to at the time by the parties making the application.

## VI.

Error in law arising out of the findings settled by the court, and failure of the court to make requested findings of the defendants and enter judgment thereon.

Dated this 24th day of January, 1948.

WITHERSPOON, WITHER-  
SPOON & KELLEY.

Attorneys for Plaintiff

Received copy of above this 24th day of Jan.,  
1948.

PAINE, LOWE & COFFIN.

Attorneys for Defendant.

[Endorsed]: Filed Jan. 24, 1948. [502]

[Title of District Court and Cause.]

AFFIDAVIT OF FRED BEGUELIN

State of Washington,

County of Spokane—ss.

Fred Beguelin, being duly sworn, deposes and says:

That he is one and the same person who was sworn and testified as Fred Beguelin, Master Mechanic of the Inland Empire Paper Company, for the plaintiff in the above-entitled cause, and that he has examined plaintiff's Exhibit "8" which is a picture of the side view of the Sumner Steam Engine showing a Pickering Governor; that said pictures also shows the Butterfly Valve and the lever arms connected to the Butterfly Valve; that he personally inspected said lever arms of said Butterfly Valve after the accident of July 3, 1946, and found at that time that the lever arms and the hub thereof were broken, and that the violence of the pull on the hand release of the No. 4 paper machine, which was operated from the floor above by a chain which was attached to a pin held in the loops of the lever arms as shown on the attached picture, had broken the lever arm casting; this breaking of the lever arm casting was the reason why the hand release failed to pull the pin from the loops of the lever arm and release the Butterfly Valve so it would close: a copy of Exhibit 8 is attached hereto and made a part of this affidavit, and affiant has indicated on said picture among others by the following numbers: Loop (4), Pin (5) and Chain to hand release (6).



Affiant further states that the force of the pull broke the lever arm casting through the Hub (2) so that the end of the hand chain (6) attached to the Pin (5) held by the loops (4) was never pulled through and thus the counterweight on the Butterfly Valve (9) was never permitted to operate and thus close the Butterfly Valve (7).

Affiant further states that repairs were made under his direction and supervision in the shop of the Inland Empire Paper Company subsequent to the accident to the lever casting and hub. These repairs consisted of welding the hub (2) in its original position as shown in Exhibit 8 and adding a reinforced triangular web (3) to the lever casting (1).

Affiant further states that the Brownell overspeed automatic device [503] on the Sumner Steam Engine was set at about 700 feet per minute on the No. 4 paper machine which was approximately ten feet higher than the maximum operating speed of said No. 4 paper machine.

FRED BEGUELIN.

Subscribed and sworn to before me this 24th day of January, 1948.

[Seal] PHILIP H. IRWIN,

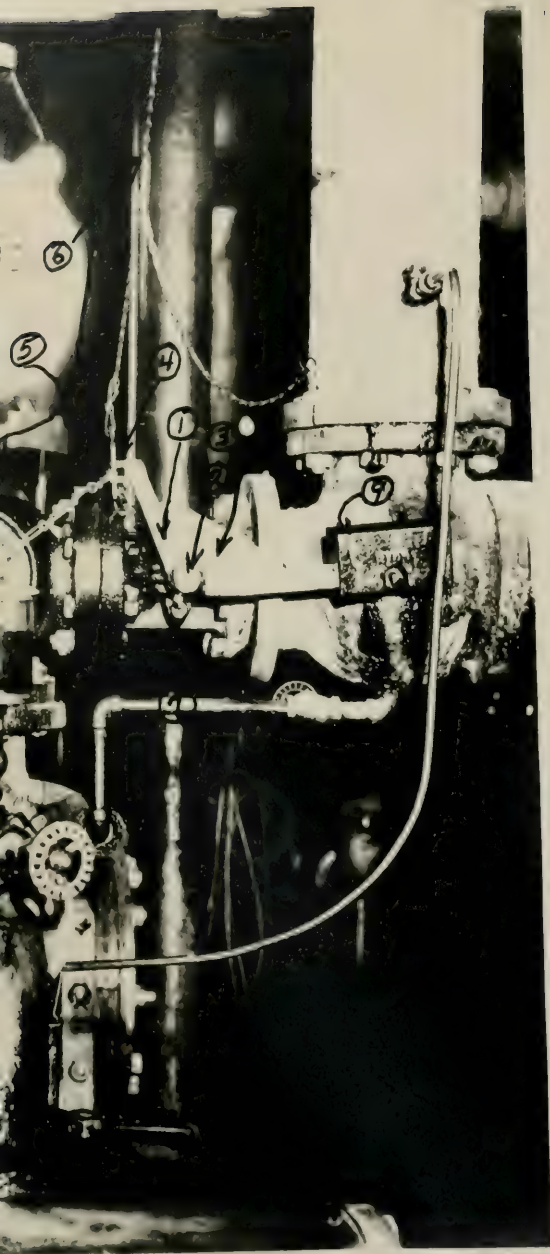
Notary Public in and for the State of Washington,  
Residing at Spokane.

Received copy of the above without picture this 24th day of Jan., 1948.

PAINE, LOWE & COFFIN,  
Attorneys for Deft.

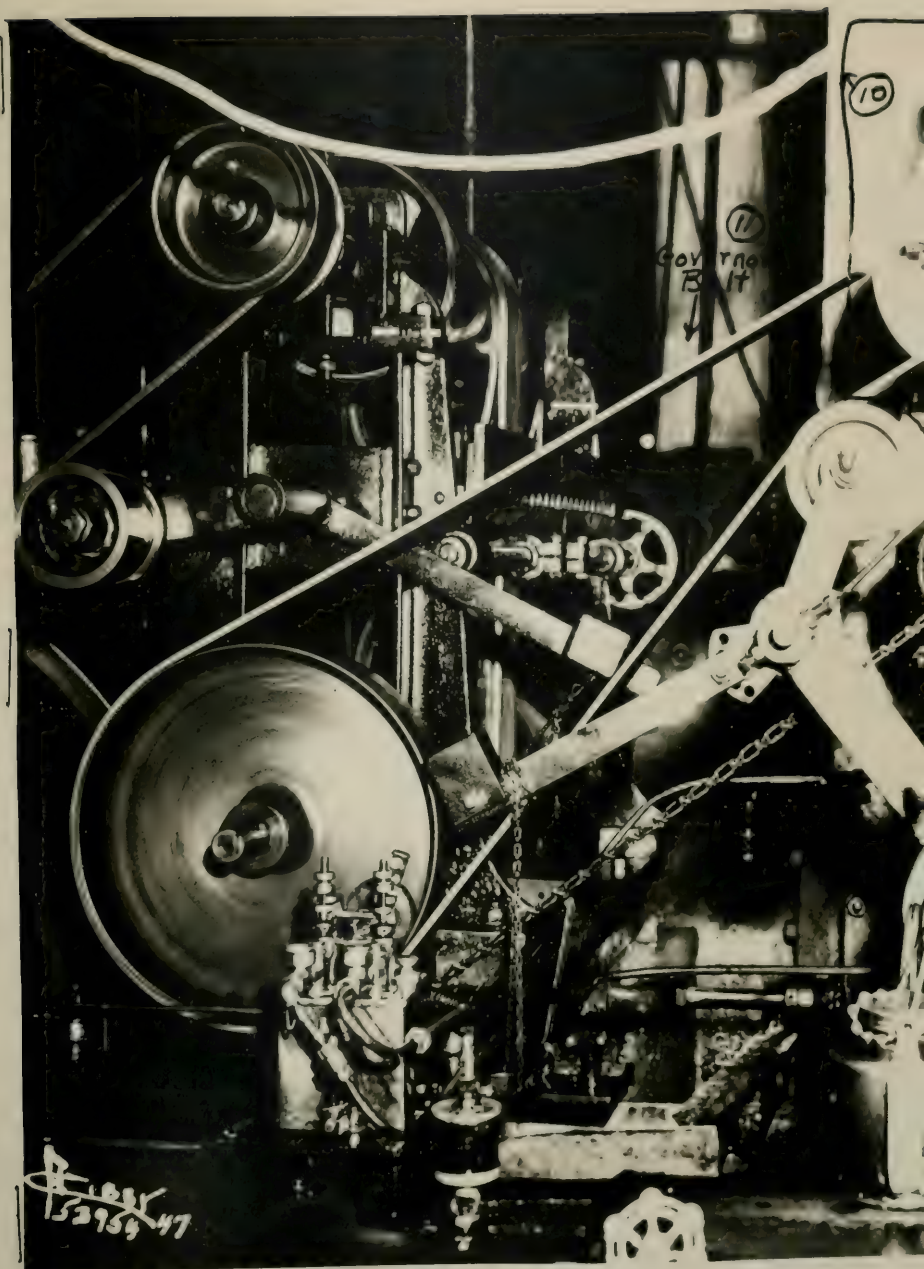
[Endorsed]: Filed Jan. 24, 1948. [504]

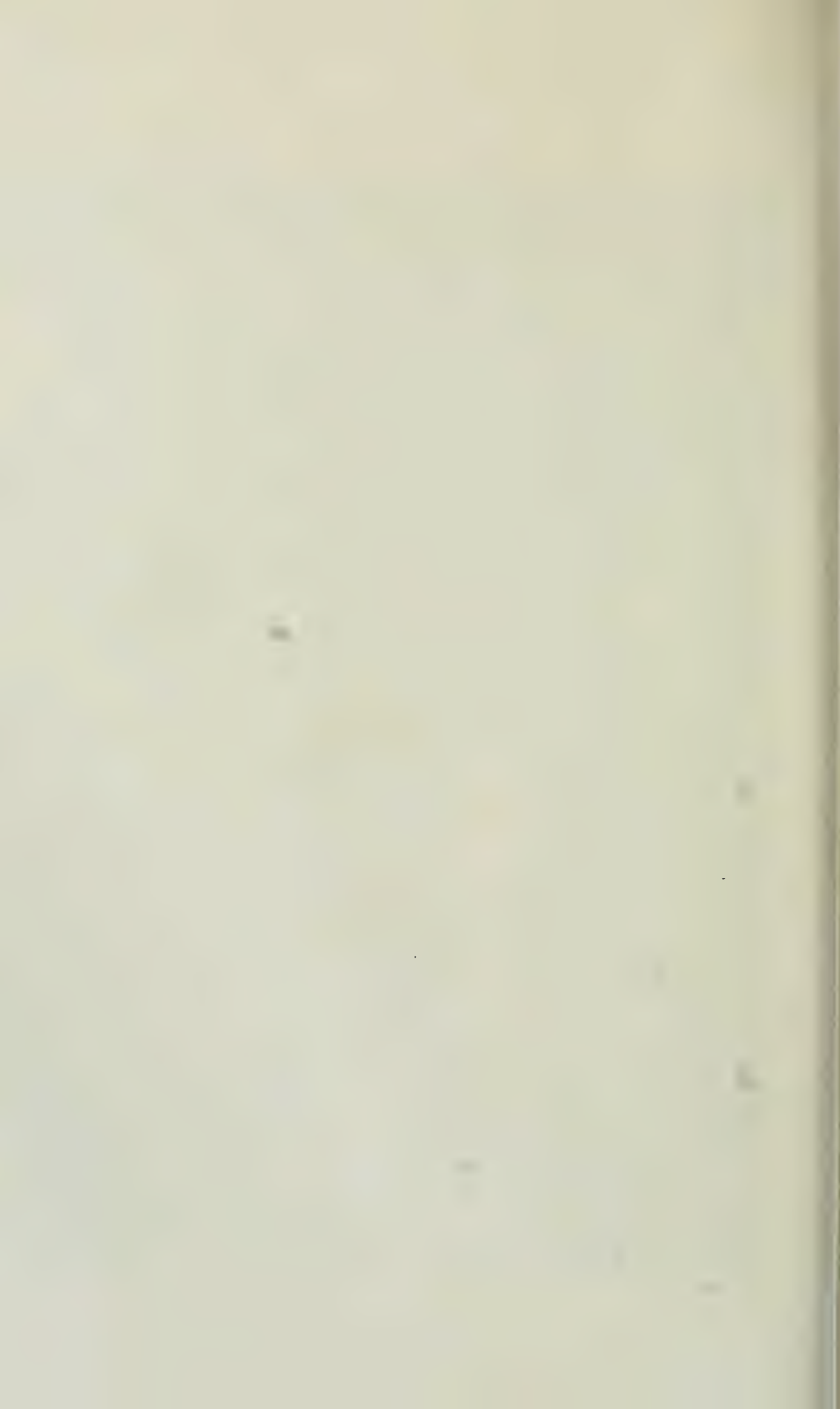




Ex. 8 Side View Sumner Steam Engine Showing Pickering Governor

- |   |                       |   |                                  |
|---|-----------------------|---|----------------------------------|
| ① | Lever Casting         | ⑦ | Butterfly Valve                  |
| ② | Hub                   | ⑧ | Chain to Brownell Trigger        |
| ③ | Triangular Web        | ⑨ | Counterweight on Butterfly Valve |
| ④ | Loop                  | ⑩ | Pickering Governor               |
| ⑤ | Pin                   | ⑪ | Governor Belt                    |
| ⑥ | Chain to Hand Release |   |                                  |







[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW RE-  
QUESTED BY PLAINTIFF

The above-entitled cause coming on for trial on the 7th day of October, 1947, and having been tried before the Court, a jury trial having been waived, William V. Kelley of Witherspoon, Witherspoon and Kelley, appearing as counsel for the plaintiff, and Alan G. Paine of Paine, Lowe & Coffin, and Franklin W. Stevenson appearing as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

FINDINGS OF FACT

I.

That the plaintiff, Inland Empire Paper Company, now is and at the time of the commencement of this action was a corporation organized in and existing under the laws of the State of Washington and was the owner of certain paper making machinery, including a certain Sumner Steam Engine at the time of its insurance and loss as hereinafter mentioned.

II.

That the defendant, Hartford Steam Boiler Inspection and Insurance Company, was at the time

of the commencement of this action and now is a corporation organized, created and existing under and by virtue of the laws of the State of Connecticut and authorized to write boiler and machinery insurance in the State of Washington.

### III.

That on the 5th day of May, 1944, at Spokane, Washington, the defendant, through its authorized representative, in consideration of \$8,914.42, which the plaintiff then paid, executed to the plaintiff a policy of insurance upon a Sumner Steam 2-Cylinder Engine with a rating cylinder size of 12 inches, designated as No. 4 on said policy, copy of which is hereto annexed and marked "Exhibit A."

That an "accident" within the purview and coverage of said policy was specifically defined and limited therein as follows by Schedule 6, paragraph C: [506]

"C. As respects any object described in this Schedule, 'Accident' shall mean a sudden and accidental breaking, deforming, burning out or rupturing of the object or any part thereof, which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the object and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing, or shaft seal or diaphragm, shall not constitute an accident, nor

shall the depletion of material in any part of the object, due to pitting, corrosion or wear, be construed as an accident."

That said policy of insurance, Schedule 6, paragraph B, sub-paragraph (a) defines an object as follows:

"B. (a) As respects any such engine, 'Object' shall mean the complete engine so described (which shall include any apparatus used as an auxiliary in the operation of the engine and mounted on its frame, and all interconnecting piping between parts of the engine), but shall not include any piping leading to or from the engine, nor the condenser or its connecting pipe (or adapter), nor any electrical machine (other than a governor motor) or part thereof whether mounted with the engine on a common shaft or bed or otherwise, nor any foundation or other structure supporting the engine, nor any mechanism, appliance or shafting connected to the engine by belts, ropes, chains, couplings, gears, pipes or other means."

#### IV.

That the Sumner Steam Engine was connected to a main line shaft of No. 4 Paper Machine located in the basement of plaintiff's plant and the main line shaft in turn was connected to the No. 4 Paper Machine located on the first floor of plaintiff's paper plant directly above and connected to the Sumner Steam Engine by belts through the main line shaft; that the Sumner Steam Engine, the main line shaft

and the No. 4 Paper Machine upstairs were one complete unit, the only source of power of which was the Sumner Steam Engine.

#### V.

That on July 3, 1946, while said Sumner Steam Engine was driving the No. 4 Paper Machine through its connection with said main line shaft, the control device on said engine failed to function, causing a sudden overspeed of said engine. This control device was a Pickering Throttling Governor which had for its purpose the maintenance of a constant speed; the Pickering Governor was driven by a leather belt from the Sumner Steam Engine as shown by plaintiff's Exhibit 8. The leather belt was a part of the Pickering Governor, and the Pickering Governor was a part of the Sumner Steam Engine. [507] The governor belt broke; the Pickering Governor did not trip because of a loose or partially loose set screw. The overspeed was caused by the breaking of the belt which drove the governor on said engine.

#### VI.

That there were also two devices designed to operate a butterfly safety valve in the main steam line to the Sumner Steam Engine, one being a safety chain which could be operated by a handle by men working on the main floor of the No. 4 Paper Machine above the Sumner Steam Engine, as shown by Exhibit 9 (handle connecting end of safety chain on operating floor) and Exhibit 8 (chain going through floor to Sumner Steam Engine), and the



other an automatic device located on the engine driving pulley which operated by centrifugal force and which was called a Brownell Overspeed Stop. This Brownell Overspeed Stop was composed of two parts, (1) a ball and spring part which was fastened on the flywheel, and (2) a trigger part which was a stationary part fastened to the frame of the engine. Exhibit .....

## VII.

The butterfly valve on the main steam line was never closed by the hand lever or the proper functioning of the Brownell Overspeed Stop. The hand lever, as shown in Exhibit 9, did not close the butterfly valve because the lever arm on the valve broke and the pin was not completely removed from the loops when the employees violently pulled at the handle after the Sumner Steam Engine ran away. This pin is shown in Exhibit 8, a side view of the Sumner Steam Engine showing the Pickering Governor.

The Sumner Steam Engine attained an excessive speed beyond which the Brownell Overspeed Stop was set, and the Brownell Overspeed Stop did not function normally. The trigger part of the Brownell Stop was found in a tripped position after the accident, tripped by the movement of the loose engine belt. This trigger part was in close juxtaposition of less than an inch of the engine pulley which carried the belt that tripped it. This belt operated in a weaving fashion, which, under normal operating conditions sometimes had tripped the trigger part of the Brownell Overspeed Stop.



## VIII.

That the Sumner Steam Engine, the main line shaft and the No. 4 Paper Machine as a single unit were damaged by this overspeed as follows: [508]

Paper Machine

The basement line shaft of said paper machine was twisted from one end to the other for a distance of more than 75 feet, with the result that all six couplings on said line shaft were damaged, and the eight pulleys mounted on said line shaft were all broken; the bearings supporting this line shaft were all damaged; the tops of two concrete piers supporting said line shaft were broken; two driven pulleys on the main floor above said basement line shaft were broken. The shafts supporting these two pulleys were twisted and damaged as well as certain miscellaneous other damage to the paper machine proper. In addition to said damage, the main engine belt was broken as well as all belts driving the different sections. Flying debris damaged fourdrinier wire and further damaged several table rolls.

Sumner Steam Engine

Broken lubricator lines, broken lubricator, several guards and damage to steam lines.

Plant

Various doors and windows, as well as a spare Pickering Governor, were damaged and broken by flying debris.

## IX.

That said engine and control devices thereon had been inspected by the defendant on December 16, 1945, and passed as satisfactory.

## X.

That plaintiff notified defendant's agents in Spokane immediately by telephone of the accident and that said agents in turn notified the Seattle Office of defendant, and defendant's Seattle representative phoned plaintiff the evening of July 3 and was further informed of said accident by plaintiff. Said representative, together with other representatives of defendant inspected said damage on July 5, 1946, and on the following day plaintiff furnished defendant with written notice of said accident and subsequently otherwise performed all the conditions of said policy on its part; that with the knowledge and consent of the defendant, plaintiff called in the Union Iron Works of Spokane, which had made part of said machinery and equipment, and with the knowledge, consent and approval of representatives of the defendant, the situation was appraised by the representatives of said Union Iron Works of Spokane, and said Union Iron Works of Spokane was given an order to make certain castings, line shaft bearings and other work which the plaintiff was not able to do with its own men and equipment under the circumstances. This work included nine pulleys to be cast, machined and [509] balanced as well as replacing the entire line shaft with couplings and bearings; other work such as wrecking the dam-

aged equipment, replacing the broken piers and erecting all equipment as it was received, as well as machine work on shafting and general repair work while waiting for the new equipment, was done by the maintenance crew of plaintiff with the knowledge, consent and approval of the defendant.

### XI.

That said machinery, engine and other equipment was not purchased, repaired, assembled and tried until July 29, 1946, when plaintiff was able to once more use said Sumner Steam Engine to drive said paper machine.

### XII.

That for the direct loss suffered during the period July 3 to July 29, 1946, as a result of said accident of July 3, 1946, plaintiff, at the request of defendant, submitted to defendant a statement of its loss in words and figures as follows:

“Debit Memorandum From Inland Empire  
Paper Company

Millwood, Washington,  
September 12, 1946.

To Hartford Steam Boiler Ins.  
& Ins. Co.  
707 Artic Bldg.  
Seattle, Washington

We debit your account as follows:

Overspeeding Engine #4 Accident,

1:45 P.M. July 3, 1946.

Use and Occupancy.....	\$ 7,350.00
Repair Labor, straight time, see Sheet B.....	2,524.57
Repair Labor, premium time, see Sheet B.....	321.19
Miscellaneous Repair parts drawn from Store Account, see Foreman's Requisitions at- tached .....	448.54
Miscellaneous Repairs, not accomplished see Sheet C.....	410.42
Loss of Fourdrinier Wire, see Sheet D.....	198.52
Belting of Drives, see Sheet E.....	280.74
Union Iron Works, Invoice 360566.....	4,623.77
Supervision and overhead.....	16.06

---

 \$16,173.81

Misc. In.....	7,366.06
Belting .....	280.74
Store .....	5,482.73
Wires .....	198.52
Rep. Lbr. ....	2,845.76

Inland Empire Paper Company."

## XIII.

That defendant did not and has not paid the said loss nor any part thereof, but on October 18, 1946, denied liability therefor under said policy. That plaintiff was damaged as a result of said accident in the sum of \$16,173.81.

From the foregoing Findings, the Court makes the following:

## CONCLUSIONS OF LAW

## I.

That as a direct and proximate cause of the breaking of the governor belt of the Sumner Steam Engine, the plaintiff has sustained a loss and damage

to said Sumner Steam Engine, main line shaft and No. 4 Paper Machine in the sum of \$8,823.81.

## II.

That as a direct and proximate cause from the damage to said Sumner Steam Engine, main line shaft and No. 4 Paper Machine as one unit, the plaintiff was unable to use same for the period from July 3, 1946, until July 29, 1946, to its damage in the sum of \$7,350.00.

## III.

That the plaintiff is entitled to judgment in the sum of \$16,173.81 and for interest at 6% from the 12th day of September, 1946, and for its costs and disbursements herein incurred.

Let judgment be entered accordingly.

Dated this ..... day of January, 1948.

.....,

United States District Judge.

Presented by:

WILLIAM V. KELLEY.

Copy received this 16th day of January, 1948.

PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

Refused: January 16, 1948.

SAM M. DRIVER,  
District Judge.

[Endorsed]: Filed Jan. 16, 1948. [511]



[Title of District Court and Cause.]

## ORDER

This cause came on regularly for hearing on plaintiff's Alternative Motion for a New Trial or for Entry of Plaintiff's Requested Findings and Entry of Appropriate Judgment Thereon, on the 10th day of February, 1948; William V. Kelley of Witherspoon, Witherspoon and Kelley appearing as counsel for Plaintiff, and Alan G. Paine of Paine, Lowe and Coffin appearing as counsel for Defendant, and

The Court having examined the affidavit of Fred Beguelin submitted by the plaintiffs, and having heard arguments of counsel, and being fully advised in the premises; and

It appearing that there was no irregularity in the proceedings of the Court, or adverse party, or any order of the Court, or abuse of discretion, by which such parties were prevented from having a fair trial; that there was no accident or surprise which ordinary prudence could not have guarded against; that there was no newly discovered evidence, material for the parties making the application, which they could not with reasonable diligence have discovered and produced at the trial; that the evidence justifies the decision and is in accordance with law; and that there was no error in law occurring at the trial and excepted to at the time by the parties making the application; that there was no error in law

arising out of the findings settled by the court, and failure of the court to make requested findings of the defendants and enter judgment thereon;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: That the Plaintiff's Alternative Motion for a New Trial or for Entry of Plaintiff's Requested Findings and Entry of Appropriate Judgment Thereon, should be and the same is hereby denied. Plaintiff excepts and exception is allowed.

Done in Open Court this 10th day of February, 1948.

SAM M. DRIVER,  
Judge.

Presented by:

ALAN G. PAINE.

[Endorsed]: Filed February 10, 1948. [512]

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the above-entitled parties, through their respective attorneys, that the Clerk of the above-entitled Court may forward to Witherspoon, Witherspoon and Kelley, plaintiff's counsel, all of the exhibits offered in evidence by plaintiff and defendant (whether such exhibits were received or rejected) for use in the preparation of brief on appeal. Plaintiff's counsel will give to the Clerk of the above-entitled Court their receipt therefor. When said exhibits have served their purpose, plaintiff's counsel will in turn deliver them to defendant's counsel for preparation of defendant's brief and take receipt of counsel for defendant therefor. Defendant's counsel, upon the completion of their brief, will return said exhibits to the Clerk of the above-entitled Court.

Dated this 14th day of February, 1948.

WITHERSPOON, WITHERSPOON  
& KELLEY,  
Attorneys for Plaintiff.

PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

[Endorsed]: Filed Feb. 16, 1948.

[Title of District Court and Cause.]

ORDER UPON STIPULATION TO  
WITHDRAW EXHIBITS

It Is Hereby Ordered that the Clerk of this Court may forward to Witherspoon, Witherspoon and Kelley, plaintiff's counsel, all of the exhibits offered in evidence by plaintiff and defendant (whether such exhibits were received or rejected) for use in the preparation of brief on appeal. Said plaintiff's counsel will give to the Clerk of this Court their receipt therefor. When said exhibits have served their purpose, plaintiff's counsel will in turn deliver them to defendant's counsel for preparation of defendant's brief and take receipt of counsel for defendant therefor. Defendant's counsel, [513] upon the completion of their brief, will return said exhibits to the Clerk of this Court.

Done by the Court this 16th day of February, 1948.

SAM M. DRIVER,

United States District Judge.

Presented by:

W. V. KELLEY.

Received exhibits in accordance with stipulation and above order this 16th day of February, 1948.

WITHERSPOON, WITHERSPOON  
& KELLEY,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 16, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Inland Empire Paper Company, a corporation, plaintiff, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action January 16, 1948, and filed of record in the above-entitled Court on said date and from each and every part thereof and from all rulings of the Court; and from that certain Order in the above-entitled cause signed by the Court February 10, 1948, denying Plaintiff's Alternative Motion for New Trial or for Entry of Plaintiff's Requested Findings and Entry of Appropriate Judgment, and from each and every error of law committed by the Trial Court.

Dated this 15th day of March, 1948.

WILLIAM V. KELLEY,  
WITHERSPOON, WITHERSPOON  
& KELLEY,

Attorneys for Plaintiff.

Service of the above Notice is acknowledged this 15th day of March, 1948.

PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

By ALAN P. O'KELLY.

Copy of the above Notice of Appeal mailed Paine, Lowe & Coffin, Attorneys for Defendant, this 15th day of March, 1948.

EVA M. HARDIN,  
Deputy Clerk.

[Endorsed]: Filed March 15, 1948. [514]



## APPEAL BOND

[Title of District Court and Cause.]

United States Fidelity and Guaranty Company

Baltimore, Maryland

No. 78436. \$250.00

Know All Men by These Presents, That we, Inland Empire Paper Company, a corporation, as Principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a corporation, in the just and full sum of Two Hundred Fifty and No/100ths Dollars (\$250.00), good and lawful money of the United States of America, well and truly to be paid, and for the true payment of which we hereby bind ourselves, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this 15th day of March, A.D. 1948.

The Condition of the Above Obligation Is Such That, Whereas the above named plaintiff has appealed to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, entered against it in the above-entitled action on the 16th day of January, 1948; and

Whereas, the above named principal has heretofore given due and proper notice that it will appeal from said decision and judgment of the District Court of the United States for the Eastern District of Washington, Northern Division;

Now, if the said principal, Inland Empire Paper Company, a corporation, shall pay to the defendants above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof not exceeding Two Hundred Fifty and No/100ths Dollars (\$250.00), then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

**INLAND EMPIRE PAPER  
COMPANY,**

[Seal]      By A. W. WITHERSPOON,  
                    President.

**UNITED STATES FIDELITY  
AND GUARANTY  
COMPANY,**

[Seal]      By THOS E. MOLONEY,  
                    Attorney-in-Fact.

From the Office of Old National Insurance, Inc.  
1124 Old National Bldg., Spokane

Received copy of above this 18th day of March,  
1948.

**PAINE, LOWE & COFFIN,**  
Attorneys for Defendant.

[Endorsed]: Filed March 18, 1948. [515]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD  
TO BE CERTIFIED FOR APPEAL PURPOSES

Comes now Inland Empire Paper Company, a corporation, plaintiff, and hereby designates the following parts of the record and proceedings to be included in the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

1. Transcript of that case in the Superior Court of the State of Washington, in and for the County of Spokane "Inland Empire Paper Company, a corporation, plaintiff, vs. Hartford Steam Boiler Inspection and Insurance Company of Hartford, Connecticut, a corporation, defendant," being No. 109095 in said Superior Court and filed in the United States District Court, May 29, 1947, as cause No. 657, including the Summons and Complaint and Order of Removal to the United States District Court.
2. Answer of Defendant in the District Court of the United States.
3. Reply.
4. Findings of Fact and Conclusions of Law signed by the Court, January 16, 1948.
5. Judgment in favor of Defendant signed and entered January 16, 1948.
6. Alternative Motion for New Trial or for Entry of Plaintiff's Requested Findings and Entry of Appropriate Judgment thereon.

7. Affidavit of Fred Beguelin in Support of Alternative Motion, including the copy of Exhibit 8, attached thereto and made a part of the Affidavit.
8. Findings of Fact and Conclusions of Law Requested by Plaintiff, filed January 16, 1948.
9. Order denying Plaintiff's Alternative Motion for New Trial or for Entry of Plaintiff's Requested Findings and Entry of Appropriate Judgment signed February 10, 1948.
10. Reporter's transcript of all testimony, evidence and proceedings at the trial, including the rulings of the Court on the admission and exclusion of testimony.
11. Order upon Stipulation to Withdraw Exhibits.
12. Notice of Appeal, and Bond on Appeal.

The Clerk of the above entitled Court is hereby directed to prepare, certify and transmit to said Circuit Court of Appeals the above designated Record on Appeal.

Dated this 15th day of March, 1948.

WILLIAM V. KELLEY,  
WITHERSPOON, WITHERSPOON  
& KELLEY,

Attorneys for Plaintiff. [516]

Service of the above Designation of Portions of Record to be Certified for Appeal Purposes is acknowledged this 15th day of March, 1948.

PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

By ALAN P. O'KELLEY.

[Endorsed]: Filed March 15, 1948.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF PORTIONS OF  
RECORD TO BE CERTIFIED FOR AP-  
PEAL PURPOSES.

Comes now Inland Empire Paper Company, a corporation, plaintiff, and hereby designates for inclusion the complete record and all the proceedings and evidence in the above-entitled cause to be included in the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit.

The Clerk of the above-entitled Court is hereby directed to prepare, certify and transmit to said Circuit Court of Appeals the above designated complete record and all the proceedings and evidence in the action.

Dated this 1st day of April, 1948.

WILLIAM V. KELLEY,  
WITHERSPOON, WITHERSPOON  
& KELLEY,  
Attorneys for Plaintiff.

Service of the above Amended Designation of Portions of Record to be Certified for Appeal Purposes is acknowledged this 1st day of April, 1948.

PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

[Endorsed]: Filed April 1, 1948. [517]



[Title of District Court and Cause.]

STIPULATION

The parties stipulate that the original defendant's exhibit No. 12 cannot be reproduced and ask that the Court direct the Clerk to forward said original defendant's exhibit 12 in lieu of a copy thereof to the Clerk of the United States Circuit Court of Appeals for the Ninth District.

Dated this 8th day of April, 1948.

WITHERSPOON, WITHERSPOON  
& KELLEY,

Attorneys for Plaintiff.

PAINE, LOWE & COFFIN,  
Attorneys for Defendant.

[Endorsed]: Filed April 8, 1948.

---

[Title of District Court and Cause.]

ORDER FORWARDING DEFENDANT'S  
EXHIBIT NO. 12

The Court having considered the stipulation of the parties on file,

It Is Hereby Ordered that the Clerk of this Court may forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit the original defendant's exhibit No. 12.

Done by the Court this 8th day of April, 1948.

SAM M. DRIVER,

United States District Judge.

Presented by:

W. V. KELLEY.

[Endorsed]: Filed April 8, 1948. [518]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing type-written pages numbered from 1 to 518 (in two volumes) to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals as called for by the Designation and Amended Designation of Portions of Record to be certified for appeal purposes, as the same remain on file and of record in the Office of the Clerk of said District Court, and that the same constitutes the record on appeal of Inland Empire Paper Company, a corporation, from the final judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that the original defendant's exhibit 12, a piece of belting, is transmitted herewith in accordance with the order of this court entered on April 8, 1948.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing record amount to the sum of \$22.00 and that

the same has been paid in full by Witherspoon, Witherspoon & Kelley, Attorneys for the Appellant.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid District Court this 22nd day of April, 1948.

[Seal]      /s/ A. A. LaFRAMBOISE,  
Clerk, United States District Court, Eastern District of Washington. [519]

[Endorsed]: No. 11908. United States Circuit Court of Appeals for the Ninth Circuit. Inland Empire Paper Company, a Corporation Appellant, vs. Hartford Steam Boiler Inspection and Insurance Company of Hartford Connecticut, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed April 23, 1948.

            /s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals,  
Ninth Circuit  
No. 11908

INLAND EMPIRE PAPER COMPANY,  
a corporation,

Appellant,

vs.

THE HARTFORD STEAM BOILER INSPEC-  
TION AND INSURANCE COMPANY,  
a corporation,

Appellee.

REQUEST FOR PRINTING OF RECORD  
AND STATEMENT OF POINTS

I.

Appellant deems consideration by the Court of the entire record certified to this Court by the Clerk of the District Court necessary on this appeal to a proper understanding of the questions presented, and hereby requests that the same be printed, excepting and omitting formal parts of pleadings and other court papers.

II.

Appellant hereby designates for consideration on this appeal the following points on which it intends to rely:

(1) The proximate cause of the overspeeding of the insured Sumner Steam Engine was the breaking of its belt that drove its governor. The direct

result of this overspeed was the damage to machinery directly attached to the engine and the adjacent premises. The speed of the insured engine was supposed to be kept constant for the purpose of making paper by a governor which was called a Pickering Governor. This Pickering Governor was driven by a belt. (Exhibit 12). This belt was a part of the engine and governor. This belt broke. (Record of Proceedings at the Trial 183, 305.)

(2) After the belt driving the Pickering Governor broke, the safety stop on the Pickering Governor failed to function to prevent the insured engine from overspeeding. This safety stop had been placed upon the engine at the request of the insurance company, (R.P.T. 195, 196, 260) which recommended that the governor be fitted with a safety stop so that in case the governor belt should break, the governor valve would be closed automatically and the engine stopped from running away. (Plaintiff's Exs. 15 and 17). However, this safety stop placed on the Pickering Governor to shut the steam supply off if the governor belt should break did not function at the time of the accident. (R.P.T. 183, Ex. 12.)

(3) After the safety stop on the Pickering Governor failed, the Pickering Governor immediately opened wide over speeding the insured engine and turned the line shaft pulleys and attached paper machine so fast (R.P.T. 56, 57, 32, 46, 51, 52, 71 and 72) that the pulleys on the line shaft and two pulleys on the paper machine upstairs burst. The



line shaft was twisted and destroyed, and the plaintiff sustained damages in the amount of \$16,173.81. (P. Ex. 14.)

(4) After the belt of the Pickering Governor of the insured engine broke, and after its safety stop failed to function, the connected line shafting operated the No. 4 paper machine as one unit at a sudden and excessive speed just before the break up of the line shafting and the machinery. This sudden and excessive speed came and could only come from one source, the insured Sumner Steam Engine. (R.P.T. 32, 46, 51, 52, 56, 57, 71 and 72.)

(5) After the belt of the Pickering Governor of the insured engine broke, and after the safety stop of the Pickering Governor failed to function, the other two control devices of the insured engine also failed to function and stop the sudden and excessive speed of the engine. (R.P.T. 183, 305.) These other two control devices were a Brownell Overspeed Stop and a Hand Pull Safety Chain. (P. Exs. 8, 9 and 10, R.P.T. 100, 86 and 98.) With only this type of stop, should this mechanism fail, serious results were bound to follow. (R.P.T. 260.) This was the reason why the insurance company had recommended that the paper company put a safety stop on the Pickering Governor. (R.P.T. 195, 260, P. Exs. 15 and 16.) Both of these control devices, the Brownell Overspeed Stop and the Hand Pull Safety Chain, were attached to the butterfly valve on the main steam line coming into the insured engine. Either control device was supposed to close this butterfly valve, (R.P.T. 170, 181 and 192) which oper-

ated like an old-fashioned damper on an old-fashioned wood stove, and was used for emergency closing of the steam line. The Brownell Overspeed Stop was a mechanically operated stop on the flywheel of the insured engine which was supposed to operate automatically to shut off the engine when it attained a certain set speed, usually about 10% higher than the maximum paper making speed, while the Hand Pull Safety Chain, which was also attached to the butterfly valve, could be operated manually. (P. Exs. 8, 11, R.P.T. 164.) The Brownell Overspeed Stop was supposed to operate automatically if the Pickering Governor failed and the engine overspeeded.

(6) The Brownell Overspeed Stop had been set to shut the engine off automatically at about 270 revolutions per minute (R.P.M.), or at a corresponding speed for the attached No. 4 paper machine of 700 lineal feet per minute. (R.P.T. 170.) At the time of the accident the Brownell Overspeed Stop never functioned and the insured Sumner Steam Engine was going at least 800 R.P.M., or almost three times the speed at which the Brownell Overspeed Stop had been set, and the No. 4 paper machine was driven faster than it had ever before been driven at an estimated speed of 2,000 lineal feet per minute. (R.P.T. 32, 46, 51, 52, 64, 71, 72 and 84.)

(7) The Trial Court erred in disregarding the undisputed physical fact that the belt of the Pickering Governor broke and that the safety stop on

the Pickering Governor did not function after the belt broke; in disregarding the undisputed physical fact that the Brownell Overspeed Stop did not function at the speed for which it was set (R.P.T. 129, 164) even though there was no evidence by any party as to why the Brownell Overspeed Stop did not function to close the butterfly valve; in disregarding the physical fact that the Hand Pull Safety Chain did not function to close the butterfly valve. (R.P.T. 86, 98.) The Trial Court erred in denying plaintiff's alternative motion for new trial or entry of plaintiff's requested findings and entry of judgment thereon (Transcript 512) for the reason that he ignored the doctrine of *res ipsa loquitur* in ruling that the plaintiff had not made a *prima facie* case and because the evidence did not justify the Trial Court's decision. (R.P.T. 1 to 449.)

#### Pickering Governor

(8) The Trial Court erred in admitting in evidence, over plaintiff's objection, testimony of the defendant showing a certain experiment conducted August 3, 1946, after the accident under conditions dissimilar to the operating conditions of the engine at the time of the accident, whereby it was sought to be shown by the defendant that the safety stop of the Pickering Governor must have functioned. (R.P.T. 297.)

(9) The Trial Court erred in admitting in evidence, over plaintiff's objection, testimony of defendant's witness, Philip McKeon, and in denying

plaintiff's motion to strike the testimony for the reason that it related to tests conducted on the Sumner Steam Engine at a period almost a month after the accident and at a time when the plaintiff's plant had been repaired and the machinery in question renovated and operating under conditions dissimilar to those existing at the time of the accident. (R.P.T. 328 to 336.)

(10) The Trial Court erred in rejecting formal offers of proof that the Spokane and Seattle representatives of defendant insurance company admitted on or about August 4, 1946, after investigation of the accident, that the proximate cause in their opinion was the breaking of the belt on the Pickering Governor. (R.P.T. 133, 134, 210 to 211.)

#### Butterfly Valve

(11) The Trial Court erred in admitting in evidence, over plaintiff's objection, testimony of defendant showing certain experiments conducted July 7, 1946, after the accident, which were performed under conditions dissimilar to the operating conditions of the engine at the time of the accident, whereby it was sought to be shown by the defendant that the butterfly valve could have leaked enough steam into the insured engine so that the paper machine could have operated even if the Brownell Overspeed Stop or the Hand Pull Safety Chain, or both, had function, (R.P.T. 313 to 316) in view of the undisputed testimony that there never had been enough steam leaking through the butterfly valve to operate the engine (R.P.T. 152)



and that there had never been an instance of overspeeding the engine with the butterfly valve closed. (R.P.T. 171.) The Trial Court erred in rejecting proffered testimony that another portion of the insured engine, in addition to the belt of the Pickering Governor, had in fact broken at the time of the accident, to wit: a part of the Hand Pull Safety Chain. (Affidavit of Fred Beguelin, Tr. 503.)

(12) The Trial Court erred in admitting in evidence, over plaintiff's objection, testimony of an insurance inspector of defendant that he had been told by a stationary engineer of plaintiff that "one time they had made paper for several hours with this butterfly valve in a closed position." (R.P.T. 256.)

/s/ WILLIAM V. KELLEY,  
WITHERSPOON, WITHERSPOON  
& KELLEY,  
Attorneys for Appellant.

Service of the foregoing Request for Printing of Record and Statement of Points, by receipt of a copy thereof, is hereby accepted this 27th day of April, 1948.

PAINE, LOWE & COFFIN,  
Attorneys for Appellee.

[Endorsed]: Filed April 29, 1948.



No. 11908

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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INLAND EMPIRE PAPER COMPANY,  
a corporation,

*Appellant,*

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD, CONNECTICUT, a corporation,  
*Appellee.*

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**Appellant's Opening Brief**

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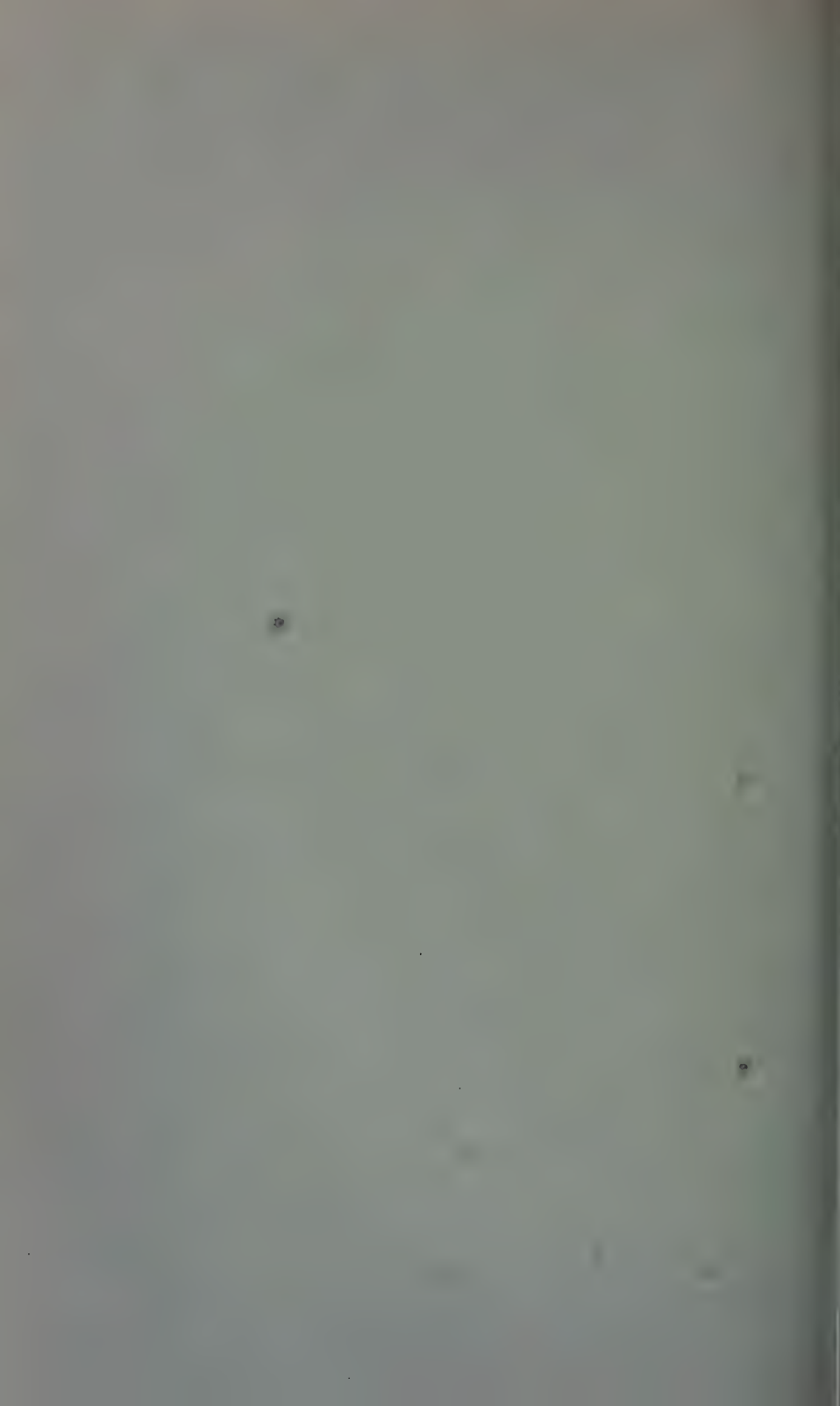
*Upon Appeal from the District Court of the United  
States for the Eastern District of Washington*

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WITHERSPOON, WITHERSPOON AND KELLEY,  
WILLIAM V. KELLEY,

1114 Old National Bank Building  
Spokane, Washington,

*Attorneys for Appellant.* JUL - 7 1948



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No. 11908

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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INLAND EMPIRE PAPER COMPANY,  
a corporation,

*Appellant,*

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD, CONNECTICUT, a corporation,

*Appellee.*

---

### Appellant's Opening Brief

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*Upon Appeal from the District Court of the United  
States for the Eastern District of Washington*

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WITHERSPOON, WITHERSPOON AND KELLEY,  
WILLIAM V. KELLEY,

1114 Old National Bank Building,  
Spokane, Washington,

*Attorneys for Appellant.*



## JURISDICTION

This action was brought by the plaintiff, Inland Empire Paper Company, a Washington corporation, citizen and resident, hereinafter called Paper Company, against defendant, The Hartford Steam Boiler Inspection and Insurance Company, a corporation, citizen and resident of the State of Connecticut, hereinafter called Insurance Company. The action was predicated upon a policy of insurance issued by the Insurance Company covering a certain Sumner Steam Engine owned and operated by the Paper Company and for loss and damages in the sum of \$16,173.81 to property of the Paper Company.

The controversy was therefore a controversy which at the time of the commencement of the action was and still is entirely between citizens of entirely different states, and the amount in controversy is and was at the time of the commencement of the action in excess of the sum of \$3,000.

Jurisdiction of the District Court existed under Section 41, Title 28, U.S.C.A., Judicial Code, Section 24 amended. The appeal to this Court is from the final judgment denying relief to plaintiff entered January 16, 1948, and from an order denying plaintiff's alternative motion for a new trial or for entry of plaintiff's requested findings and entry of appropriate judgment thereon, entered the 10th day of February, 1948. Notice of appeal was filed in the office of the Clerk of the District Court on the 15th day of

March, 1948, and jurisdiction is believed to exist under Sec. 225 (a) First, and (d), Title 28, U.S.C.A., Judicial Code, Sec. 128 amended. (Tr. 35 to 40).

### STATEMENT OF THE CASE

This is a suit based upon a certain policy or contract of insurance issued by defendant to plaintiff, effective May 5, 1944, whereunder plaintiff seeks to recover for loss on its property directly damaged by a certain accident of July 3, 1946. The District Court held that the plaintiff had failed to maintain the burden of proving that the damage shown (which was undisputed) came within the terms of the policy of insurance. (Tr. 448).

The plaintiff, Inland Empire Paper Company, hereinafter called the "Paper Company," is a Washington corporation located at Millwood, Washington, approximately 7 miles from the center of the City of Spokane, Washington, engaged in the manufacture of newsprint paper. The defendant, The Hartford Steam Boiler Inspection and Insurance Company, hereinafter called the "Insurance Company," is a Connecticut corporation engaged in writing boiler and machinery insurance. (Tr. 3, 44-45, 52).

The Paper Company was the owner of certain paper making machinery, including a Sumner Steam Engine. (Ex. 8). The Sumner Steam Engine was directly connected to the paper machinery by belts through a line shaft. The Sumner Steam Engine and the line shaft were located in the basement floor of the plant

of the Paper Company. The line shaft, at the time of the loss, consisted of about 139 feet of shafting and 8 pulleys with suitable bearings, sole plates and couplings. This line shaft was located approximately 20 feet west of the Sumner Steam Engine and was connected with the Sumner Steam Engine by a 22-inch rubber belt. (Plaintiff's Ex. 2, 3 and 4).

On the 5th day of May, 1944, at Spokane, Washington, the Insurance Company, through its authorized representative, in consideration of \$8,914.42, which the Paper Company then paid, executed to the plaintiff a policy of insurance upon the Sumner Steam Engine.

An "accident" within the purview and coverage of said policy was specifically defined and limited therein as follows by Schedule 6, paragraph C:

"C. As respects any object described in this Schedule, 'Accident' shall mean a sudden and accidental breaking, deforming, burning out or rupturing of the object or any part thereof, which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the object and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing, or shaft seal or diaphragm, shall not constitute an accident, nor shall the depletion of material in any part of the object, due to pitting, corrosion or wear, be construed as an accident."

Said policy of insurance, Schedule 6, paragraph B, sub-paragraph (a) defines an object as follows:

“B. (a) As respects any such engine, ‘Object’ shall mean the complete engine so described (which shall include any apparatus used as an auxiliary in the operation of the engine and mounted on its frame, and all interconnecting piping between parts of the engine), but shall not include any piping leading to or from the engine, nor the condenser or its connecting pipe (or adapter), nor any electrical machine (other than a governor motor) or part thereof whether mounted with the engine on a common shaft or bed or otherwise, nor any foundation or other structure supporting the engine, nor any mechanism, appliance or shafting connected to the engine by belts, ropes, chains, couplings, gears, pipes or other means.”

The Sumner Steam Engine was connected to a main line shaft of a “No. 4 Paper Machine” located in the basement of Paper Company’s plant and the main line shaft in turn was connected to the No. 4 Paper Machine itself located on the first floor of Paper Company’s plant directly above and connected to the Sumner Steam Engine by belts through the main line shaft. The Sumner Steam Engine and the main line shaft downstairs and the No. 4 Paper Machine upstairs were one complete unit, the only source of power of which was the Sumner Steam Engine.

There were three control devices of the Sumner Steam Engine by which its speed should have been controlled: (1) a Pickering Governor (Ex. 8), (2) a Brownell Overspeed Stop (Ex. 11) and (3) a Hand-pull Safety Chain (Ex. 9). These had all been inspected by the Insurance Company on December 16, 1945, and passed as satisfactory.



On July 3, 1946, while the Sumner Steam Engine was driving the No. 4 Paper Machine through its connection with said main line shaft, the first control device on the engine, the Pickering Governor, failed to function because a leather belt broke, causing a sudden overspeed of the engine. This control device had for its purpose the maintenance of a constant speed of the Sumner Steam Engine. The Pickering Governor was driven by a leather belt from the Sumner Steam Engine as shown by plaintiff's Exhibit 8. The leather belt was a part of the Pickering Governor, and the Pickering Governor was a part of the Sumner Steam Engine. It is undisputed that the Pickering Governor belt broke. The Paper Company maintained this broken belt was the cause of the accident and the Insurance Company maintained it was the result of the accident, occurring after the damage. Steam came into the Sumner Steam Engine through a main steam line. The two other control devices were designed to operate a butterfly safety valve in the main steam line to the Sumner Steam Engine. This butterfly valve turned in the steam line like a hand damper on an old fashioned wood stove. The second control device was an automatic device located on the Sumner Steam Engine flywheel driving pulley itself which operated by centrifugal force and was called a Brownell Overspeed Stop. The third control device was the Handpull Safety Chain, a safety chain which could be operated manually by men working on the main floor on the No. 4 Paper Machine above the Sumner Steam Engine as shown by



Exhibit 9 (handle connecting end of safety chain on operating floor) and Exhibit 8 (chain going through floor to Sumner Steam Engine).

It was the theory of the Paper Company that the belt of the Pickering Governor broke (which was undisputed) and that the safety stop on the Pickering Governor failed to function (which was disputed), because of a loose set screw; that the Sumner Steam Engine speeded to at least three or four times its normal speed (which was undisputed); that this excessive speed was far above that at which the Brownell Overspeed Stop had been set to operate (which was undisputed) and that the Brownell Overspeed Stop never functioned normally to close the butterfly valve (which was disputed) and that the Handpull Safety Chain device broke and also did not function to close the butterfly valve (which cannot be disputed).

An understanding of these three control devices is essential.

## 1. PICKERING GOVERNOR

The Pickering Governor was a ball-type throttle governor designed to maintain a constant speed on the engine. The engine had to be set at a constant speed for driving the No. 4 Paper Machine, depending on the type of paper being made. This had to be a constant speed, because otherwise the paper would break into pieces on the press rolls upstairs and would be thrown in the air. The paper speed on the No. 4 machine at the time of the loss was set for approxi-

mately 346 lineal feet per minute paper speed, which corresponded to an engine speed of about 138 revolutions per minute. The term 346 lineal feet per minute "paper speed" means that there were 346 lineal feet of paper coming out of the No. 4 Paper Machine, shown on Exhibit 1, per minute. The very highest speed that the No. 4 machine had ever manufactured any paper was 690 lineal feet per minute paper speed, which corresponded to an engine speed of approximately 270 revolutions per minute. (Tr. 209). However, this maximum speed was almost double the speed the paper machine was set to operate at the time of the damage. (Tr. 209). There was a constant fixed relationship between this "paper speed" and the speed of the engine. The speed of the engine in revolutions per minute, or R.P.M., times 2.52 (a constant formula factor) would give the paper speed approximately.

#### THE SAFETY STOP ON THE PICKERING GOVERNOR

There had been a safety device placed upon the Pickering Governor to stop the engine in the event that the belt of the Pickering Governor broke. This has been placed on it by the Paper Company at the specific recommendation of the Insurance Company. (Tr. 223-224, Ex. 15, 16 and 17). Prior to the time this safety device had been placed upon the Pickering Governor, the Paper Company had been dependent upon the Brownell Overspeed Stop stopping the engine in case of the belt breaking on the Pickering Governor. (Tr. 223-224). This safety device on the Pickering Governor is shown in Exhibit 8. The

manner in which it operated was that an idler pulley rode on the belt between the governor and the engine. If this belt between the governor pulley and the engine pulley should break, then this idler rider pulley being counterbalanced by a weight (shown in the lower left-hand corner of Exhibit 8) would come up and release the Pickering Governor and close the valve on the Pickering Governor, stopping the engine. When the tension of the belt was removed, this weight fell down and the idler pulley ran up and tripped the mechanism on the Pickering Governor. (Tr. 137-139).

It was the theory of the Paper Company that after the belt broke on the Pickering Governor, this safety device failed to trip, because of a loose set screw, and the other control devices, hereinafter described, also failed to function, and the Sumner Steam Engine oversped and a general wreck resulted. (Tr. 209). It was undisputed and admitted by both parties that if the automatic safety stop on the Pickering Governor had been tripped, the engine could not have oversped. (Tr. 321-322).

## 2. BROWNELL OVERSPEED STOP

The Brownell Overspeed Stop was also a safety device to stop the engine in case of an overspeed by closing the main steam line. This was accomplished by means of a ball and spring located on the flywheel of the Sumner Steam Engine, which, under centrifugal force, was cast outward and in turn released a

trigger fastened to the frame of the engine, (Ex. 11), which trigger, when released, allowed the butterfly valve on the main steam line to close. The butterfly valve consisted of a body with a disk pivoted in the center used for the emergency closing of the main steam line. It was like an old fashioned damper on an old fashioned wood stove. (Ex. 8).

This trigger of the Brownell Overspeed Stop was only about one-half an inch away from the main belt of the Sumner Steam Engine to the line shaft pulleys, (Tr. 188) and is marked with the letter "T" in the center of Exhibit 11. The trigger could be tripped by hand or by accidentally coming in contact with the engine belt.

The Brownell Overspeed Stop was set to operate at the time of the accident when the No. 4 Paper Machine upstairs attained a paper speed of 700 lineal feet per second and an engine speed of 277 R.P.M.'s. Overspeed tests on this Brownell Overspeed Stop had been made two or three months before the accident and the Brownell Overspeed Stop had tripped at that point of 277 R.P.M.'s. (Tr. 196-197).

### 3. HANDPULL SAFETY CHAIN

The butterfly valve was operated, in addition to the Brownell Overspeed Stop, by a Handpull Safety Chain. One end of this chain was attached to a hand trip located alongside the dryers of the No. 4 Paper Machine on the floor above the Sumner Steam En-



gine. (Plaintiff Ex. 9). This Safety Chain went through the floor above the Sumner Steam Engine (Plaintiff Ex. 10) and was attached to the butterfly valve lever by means of a draw pin. (Ex. 8 and 10). There was a weight that worked as a lever which turned the butterfly valve to a position to shut it off against the flow of steam like an old fashioned damper on an old fashioned wood stove. (Tr. 136, 301). By pulling the handpull upstairs the draw pin downstairs could be withdrawn and a weight released which would drop down and close the butterfly valve. The draw pin held this weight in place so that as long as the draw pin remained in the loops of the chain, the weight could not drop down and close the butterfly valve. (Tr. 136). Although this handpull was operated upstairs by workmen when the machinery ran away, this draw pin was never quite pulled out of the loops of the chain downstairs, (Tr. 124-125) so that pulling the handle upstairs had failed to operate to turn the butterfly valve downstairs to a position to shut off the steam feeding the engine. (Tr. 134-135). This was undisputed at the trial, but the Trial Court, whose theory was that the Brownell Overspeed Stop had functioned in a normal manner, apparently must have also considered that the Handpull Safety Chain had functioned in a normal manner. The Court said:

“We also have to assume, which has been pointed out here as rather improbable, to me, that although this hand safety stop had been set up, connected with a chain to the butterfly valve extending up into the upper room, where the



paper machine was operating, a convenient handhold in the floor, the men evidently had been instructed about it, knew it was there, and when this evidence of speeding was noticeable they ran over and they pulled that, and no doubt pulled it violently and *in a way that should have made it work.*" (Tr. 451). (Underlining ours).

The Sumner Steam Engine, the main line shaft and the No. 4 Paper Machine as a single unit were damaged by this overspeed as follows:

#### PAPER MACHINE

The basement line shaft of said paper machine was twisted from one end to the other for a distance of more than 75 feet, with the result that all six couplings on said line shaft were damaged, and the eight pulleys mounted on said line shaft were all broken; the bearings supporting this line shaft were all damaged; the tops of two concrete piers supporting said line shaft were broken; two driven pulleys on the main floor above said basement line shaft were broken. The shafts supporting these two pulleys were twisted and damaged as well as certain miscellaneous other damage to the paper machine proper. In addition to said damage, the main engine belt was broken as well as all belts driving the different sections. Flying debris damaged fourdrinier wire and further damaged several table rolls.

#### SUMNER STEAM ENGINE

Broken lubricator lines, broken lubricator, several broken guards and damage to steam lines.

#### PLANT

Various doors and windows, as well as a spare Pickering Governor were damaged and broken by flying debris.

The Paper Company notified Insurance Company's agents in Spokane immediately by telephone of the accident and these agents in turn notified the Seattle Office of Insurance Company, and Insurance Company's Seattle representative phoned Paper Company the evening of July 3 and was further informed of said accident by Paper Company. The Seattle representative, together with other representatives of Insurance Company inspected said damage on July 5, 1946, and on the following day Paper Company furnished Insurance Company with written notice of said accident and subsequently otherwise performed all the conditions of said policy on its part. With the knowledge of the Insurance Company, Paper Company called in the Union Iron Works of Spokane, which had made part of said machinery and equipment, and with the knowledge of representatives of the Insurance Company, the situation was appraised by the representatives of said Union Iron Works of Spokane, and said Union Iron Works of Spokane was given an order to make certain castings, line shaft bearings and other work which the Paper Company was not able to do with its own men and equipment under the circumstances. This work included nine pulleys to be cast, machined and balanced, as well as replacing the entire line shaft with couplings and bearings; other work such as wrecking the damaged equipment, replacing the broken piers and erecting all equipment as it was received, as well as machine work on shafting and general repair work while waiting for the new equipment, was

done by the maintenance crew of Paper Company with the knowledge of the Insurance Company. This machinery, engine and other equipment was not purchased, repaired, assembled and tried until July 29, 1946, when Paper Company was able to once more use said Sumner Steam Engine to drive said paper machine.

That for its claim for the direct loss suffered during the period July 3 to July 29, 1946, as a result of said accident of July 3, 1946, Paper Company submitted on September 17, 1946, to Insurance Company a statement of its loss in words and figures as follows:

“Debit Memorandum  
from  
Inland Empire Paper Company  
Millwood, Washington  
September 12, 1946

To Hartford Steam Boiler Ins.  
& Ins. Co.  
707 Artie Bldg.  
Seattle, Washington

We debit your account as follows:  
Overspeeding Engine No. 4 Accident,

1:45 P. M. July 3, 1946.

Use and Occupancy.....	\$ 7,350.00
Repair, Labor, straight time,.....	2,524.57
see Sheet B.	
Repair Labor, premium time,.....	321.19
see Sheet B.	
Miscellaneous Repair parts drawn.....	448.54
from Store Account, see Foreman's Requisitions attached	
Miscellaneous Repairs, not accom-.....	410.42
plished, see Sheet C	
Loss of Fourdrinier Wire, see Sheet D.....	198.52

Belting of Drives, see Sheet E.....	280.74
Union Iron Works, Invoice 360566.....	4,623.77
Supervision and overhead.....	16.06

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\$16,173.81

Misc. In.....	7,366.06
Belting .....	280.74
Store .....	5,482.73
Wires .....	198.52
Rep. Lbr. ....	2,845.76

Inland Empire Paper Company"

On October 18, 1946, Insurance Company denied liability therefor under said policy and subsequently this suit was brought. When the plaintiff rested, the defendant moved for a non-suit on the ground that the plaintiff had failed to sustain the burden of proof to show that it was entitled to recover under the policy for the reason that the stipulated damage was not directly caused by any accidental breaking of any portion of an insured object directly under the terms of the policy. (Tr. 261-262). The Court took this motion under advisement, (Tr. 262-263) and at the conclusion of the testimony and after argument of counsel, ruled that the plaintiff had failed to maintain the burden of proving that the damage to the machinery came within the terms of the policy of insurance. (Tr. 448-449). While he did not make any extended or exhaustive review of the evidence, the Trial Court stated the basis for his ruling, which, in part, was that even if the safety stop on the Pickering Governor had failed to work, (Tr. 450), the Brownell Overspeed Stop did work (Tr. 450), or at least the Handpull Safety Chain worked (Tr. 451)



so that the butterfly valve was closed partially, (Tr. 451), but his conclusion was that the butterfly valve at the time of the accident was in such a defective condition that it not only would not stop the engine, but wouldn't even reduce its speed to the idling speed. (Tr. 451).

The Trial Court apparently thought great significance should be attached to the fact that the Summer Steam Engine was idling after the accident "with practically all of the load removed, because by that time the whole shaft had been thrown out, the main drive belt was off the driven pulley, at least, and there wasn't any load on the engine; it was running free." The Trial Court apparently disregarded the undisputed testimony that the dis-engaging of the independent clutches on the machinery neither increased nor decreased the speed of the engine, (Tr. 114-115), and the testimony that the flywheel of the engine had gone to a speed of 800 R. P. M.'s without the Brownell operating, (Tr. 159-160) and that the violence of the pulls on the Handpull actually broke the lever on the Handpull Safety Chain. As stated, this last evidence was offered to the Court in the form of an affidavit of Fred Beguelin, the master mechanic of the Paper Company, in support of the alternative motion for a new trial, which was argued earnestly in an effort to have the Trial Court open the judgment in favor of the defendant, which was entered January 16, 1948, and take additional testimony on the point. The motion was denied.



The main question the District Court had to decide on these facts was whether or not there was an accident within the purview of the policy.

## SPECIFICATIONS OF ERROR

### *Admission and Rejection of Evidence*

#### *Pickering Governor*

(1) The District Court erred in admitting and considering in evidence over plaintiff's objection testimony of the defendant showing a certain experiment conducted with respect to the Pickering Governor on August 3, 1948, after the accident under conditions dissimilar to the operating conditions of the engine at the time of the accident, whereby it was sought to be shown by the defendant that the Safety Stop of the Pickering Governor must have functioned. (Tr. 314). The grounds urged at the trial for the plaintiff's objection were:

"Mr. Kelley: Just for the record, so that I won't be interrupting, if your Honor will allow me an objection to all the line of testimony with respect to tests carried on from the month of August on, for the reason that what may have existed as to the condition of the Pickering Governor or the Brownell overspeed stop *after* the initial inspections of Wheeler the day of the accident and Mr. Fullmer and Mr. Olinger a few days after the accident, and up to and including July 10, would be inadmissible, because the evidence as existed at the date of the accident." (Italics ours) (Tr. 314).

(2) The District Court erred in admitting and considering in evidence over plaintiff's objection testimony of defendants' witness, Philip McKeon, and in denying plaintiff's motion to strike the testimony for the reason that it related to tests conducted on the Summer Steam Engine at a period almost a month after the accident and at a time when the plaintiff's plant had been repaired and the machinery in question renovated and operating under conditions dissimilar to those existing at the time of the accident. (Tr. 342 to 350). The grounds urged at the trial for the plaintiff's objection were:

"Mr. Kelley: For the record—pardon me, Mr. McKeon, we object on the grounds that it's incompetent, irrelevant and immaterial, what occurred from August 2, 1946, on, by this witness or any other witness, with respect to the Summer Steam engine, the main line shaft, and the number 4 paper machine, for the reason that the testimony shows that the machine and the main line shaft and the Summer steam engine had been repaired, renovated and placed in working operation by July 29, and that the same or similar conditions did not prevail on August 2, 1946, when this witness is purported to have made his investigation as to what may have occurred at the time of the accident." (Tr. 344).

"Mr. Kelley: At this time, if the Court please, the plaintiff moves to strike the testimony of the witness McKeon in toto for the reason that it affirmatively appears from the witness that he first came to the Inland Empire Paper Company plant on or about August 2, 1946, and conducted some tests there at a period almost a month after the accident in question, and some time after it is admitted that the plant had been repaired and

the machinery in question renovated and operating." (Tr. 350).

(3) The District Court erred in rejecting formal offers of proof that the Spokane and Seattle representatives of defendant Insurance Company admitted on or about August 4, 1946, after investigation of the accident, that the proximate cause, in their opinion, was the breaking of the belt on the Pickering Governor. (Tr. 163, 164, 165, 166, 238-240). The grounds urged at the trial for the plaintiff's objection were:

"Mr. Kelley: If your Honor pleases, this fact is admitted by the defendants, I am sure, of paragraph 6 of our complaint, but they seek to admit it without prejudice, as they call it. Now, whether or not it is without prejudice is a legal question for the Court, and I do offer to prove by this witness, if permitted to testify, that he called in the Union Iron Works of Spokane with the knowledge, consent and approval of the defendant Hartford Insurance Company, and that the situation was appraised by the representatives of the Union Iron Works of Spokane, and that with the knowledge, consent and approval of the defendant Hartford Insurance Company the Union Iron Works of Spokane was given an order to make castings and line shaft bearings and other work that was necessary to the equipment under the circumstances, and that this was all done with the knowledge, consent and approval of the defendant, who had previously by oral announcements of its representatives Fullmer and Olinger advised this witness that the proximate cause of the damage and loss to the property in question was from the breaking of the governor belt, which fact is further confirmed by the letter in evidence from the defendant Hartford Insurance Company

under date of October 18, 1946. That's the formal offer of proof, for the record.

"Mr. Paine: I object to it, your Honor.

"The Court: The objection will be sustained."  
(Tr. 239-240).

#### BUTTERFLY VALVE

(4). The District Court erred in admitting and considering in evidence over plaintiff's objection testimony of defendant showing certain experiments conducted July 7, 1946, upon the Butterfly Valve after the accident, which experiments were performed under conditions dissimilar to the operating conditions of the engine at the time of the accident whereby it was sought to be shown by the defendant that the Butterfly Valve could have leaked enough steam into the insured engine so that the paper machine could have operated even if the Brownell Overspeed Stop or the Handpull Safety Chain, or both, had functioned. (Tr. 329 to 332). The grounds urged at the trial for the plaintiff's objection were:

"Mr. Kelley: Just for the record, we make the same objection, incompetent, irrelevant, immaterial, what happened in the tests after the accident and after the butterfly valve had been taken out and had been once more replaced in the line, for the reason that the same similar conditions did not prevail as at the time of the accident.

"The Court: Overruled." (Tr. 329).

(5) The District Court erred in admitting and considering in evidence over plaintiff's objection testimony of an insurance inspector of defendant that he had been told by a stationary engineer of plaintiff



that "one time they had made paper for several hours with this Butterfly Valve in a closed position." (Tr. 279-280). The grounds urged at the trial for the plaintiff's objection were:

"Mr. Kelley: Oh, I'd have to object to that. It's incompetent, immaterial, it's hearsay; it wouldn't be binding on the plaintiff if it were material, conversations that he might have had.

"Mr. Paine: I think Mr. Wheeler was asked about it.

"The Court: I don't recall specifically all these conversations, but isn't this one he was asked about on his cross-examination? Overrule the objection." (Tr. 279).

(6) The District Court erred in rejecting proffered testimony that another portion of the insured engine, in addition to the belt of the Pickering Governor, had in fact broken at the time of the accident, to-wit: part of the Handpull Safety Chain. (Affidavit of Fred Beguelin, (Tr. 471; Tr. 503).

(7) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof, that on the 3rd day of July, 1946, while said policy was in full force and effect, the said Sumner Steam Engine overspeeded due to some undetermined cause which did not constitute an accident within the terms of said policy. (Findings of Fact No. 3, Tr. 465).

(8) The District Court erred in rendering and entering the final judgment and in concluding and hold-



ing in support thereof, that the Safety Stop on the Pickering Governor operated to bring the Sumner Steam Engine to an idling speed. (Findings of Fact No. 4, Tr. 466).

(9) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof, that either the Brownell Overspeed Stop or the Handpull Safety Chain, or both, had operated and the Butterfly Valve had been closed before any damage had been done to the plaintiff's property, but that due to the fact that the valve stem was binding in its packing, it did not completely close, but allowed the engine to continue to accelerate until the engine was brought to an idling speed by the breaking of the governor drive belt and the operation of the Pickering Governor Stop. (Findings of Fact No. 5, Tr. 466).

(10) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof, that none of the damage sued for was caused by an accident to an object insured under the policy of insurance. (Findings of Fact No. 6, Tr. 466).

(11) The District Court erred in denying plaintiff's alternative motion for a new trial or for entry of plaintiff's requested findings and entry of appropriate judgment.

## SUMMARY OF ARGUMENT

The belt driving the Pickering Governor of the insured Sumner Steam Engine broke. The Safety Stop on the Pickering Governor, which had been placed on it at the specific recommendation of the Insurance Company to stop the engine in the event that the belt did break failed to function because of a loose set screw in the arm that was supposed to trip the mechanism of the Pickering valve. The Pickering Governor immediately opened wide, speeding the Sumner Steam Engine, line shaft pulleys and connected Paper Machine so fast that the pulleys on the line shaft in the basement and two pulleys upstairs burst. The Brownell Overspeed Stop and the Handpull Safety Stop upstairs both attached to the Butterfly Valve on the main steam line never functioned to prevent this excessive speed, although The Brownell Overspeed Stop had been set to shut the Butterfly Valve at a speed far below this runaway speed that the Sumner Steam Engine. The amount of the damage was stipulated by the parties to be \$16,173.81, although the Insurance Company denied that an accident within the purview of its policy caused this damage.

The line shaft was twisted and destroyed and the property of the Paper Company was damaged as a direct result of this runaway speed of the Sumner Steam Engine. The amount of the damage was stipulated by the parties to be \$16,173.81, although the Insurance Company denied that an accident within the purview of its policy caused this damage.

## ARGUMENT

## I. Errors with Respect to the Admission and Rejection of Evidence. (1-5).

All the assignments of error which have been made by appellants necessarily require a minute examination of the evidence. For the convenience of the Court, we will discuss the five assignments relative to the admission and rejection of evidence together, because they all refer to certain experiments involving the Pickering Governor and the Butterfly Valve.

Experiments made out of the presence of the Court are competent evidence in a proper case, but before they can be admitted, it must appear that they were made under substantially the same conditions as existed at the time of the transaction in question. *Lasityr v. Olympia*, 61 Wash. 652, 112 Pac. 752. The offers of proof with respect to the Pickering Governor were rejected by the District Court, which rulings are also claimed to be erroneous, entitling appellant to a new trial at least.

## PICKERING GOVERNOR

The difference between the operation of the Pickering Governor at the time of the accident and at the time of subsequent tests a month later on August 3, was that there was a loose set screw in the mechanism of the Pickering Governor at the time the belt of the Pickering Governor broke; this loose set screw prevented the Pickering Governor from "tripping"; "tripping" would have prevented the runaway speed;

this loose set screw had been replaced by August 3, 1946, and the only thing the test on August 3, 1946, proved was that the Pickering Governor tripped at a time when a new belt had been placed upon the Pickering Governor of the Sumner Steam Engine and the loose set screw had been replaced and all machinery had been thoroughly repaired and had been running since July 29, 1946. It was undisputed that if the safety device on the Pickering Governor had tripped and operated properly after the belt broke, the Sumner Steam Engine could not have run away. A careful analysis of the evidence shows that this loose set screw at other times had prevented the Safety Stop on the Pickering Governor from operating properly. The testimony on this all important point was given by three witnesses, Wheeler for the Paper Company, Olinger and Fullmer for the insurance Company, and their testimony considered altogether shows the reason why the Safety Stop on the Pickering Governor did not work after the belt on the Pickering Governor broke. If the Safety Stop had worked, the Pickering Governor would have been in a "tripped" position.

#### TESTIMONY OF WHEELER

Wheeler, engineer and operator for the Paper Company, who came on shift a short time after the accident, testified that the Pickering Governor was not in a tripped position. He was the individual who had charge of the Sumner Steam Engine. He testified the reason the Safety Stop had not tripped after the



belt broke on the Pickering Governor was because of this loose set screw:

“A. Well, the apparent reason was that that set screw, there was an old key in that little shaft that operates the trigger that kicks out the dog on the ratchet, which releases the governor and closes it, and that set screw had evidently worked loose enough so that this arm that comes down and engages with the rod that was fastened to the tightner pulley moved the rod, the rod was loose on the trigger shaft, so that it did not touch the dog on the ratchet enough to throw it out.

“Q. That was the reason why the Pickering Governor didn’t shut off automatically after the belt broke?

“A. That’s absolutely the reason\*\*\*” (Tr. 171).

He was subjected to a thorough cross-examination by the respondent in an effort to show that the Pickering Governor must have tripped, but the cross-examination only confirmed the fact that it had not tripped and that the reason it had not tripped was because of this loose set screw. (Tr. 178, 179).

“Q. On the 5th you made some tests with him?

“A. Well, we looked it over, yes. I looked it over with a half dozen different men, not only my partner, but with Mr. Janecek and the insurance men also. We looked it over.

“Q. And at that time you found that it didn’t work?

“A. Well, I found that the first time, the first thing.

“Q. Well, you found that it hadn’t worked, the first thing, but did you try it after that?



“A. Well, you could work it by hand.

“Q. You could work it by dropping the rider pully?

“A. No, not until after they tightened the set screw.

“Q. Now, let's get to this set screw. This set screw is a little screw that goes into this—what do you call it, the trigger arm?

“A. Well, yes.

“Q. That comes down and lies on the plate?

“A. Well it has an eye in the end.

“Q. It comes into a rod here and is fastened with a little screw that goes down and rests or bites into this arm, is that correct?

“A. That's correct.

“Q. And that's a little inset hexagon screw; you have to have a special wrench to loosen it or tighten it?

“A. No, the set screw in there was an ordinary set screw with a square head, which stood up; it wasn't a sunken set screw.

“Q. It wasn't a sunken set screw?

“A. Not at that time.

“Q. You feel quite sure about that?

“A. I am.

“Q. It had a little head on it that you could turn?

“A. A square head.

“Q. Could be tightened or loosened by anybody applying a wrench to it?

“A. That's right.

“Q. If anybody had touched that or loosened it it would be loosened up?

“A. It could be, if anyone would, but I don’t know why anybody would; it was under that plate which holds the outboard bearing of the governor shaft. It was in a kind of a peculiar place to get at anyway. That’s one of the reasons why it probably hadn’t been looked after, was it being up there out of sight, and it was tight the day before, and it was tight when it was put on. It just naturally worked loose.” (Tr. 178-179).

\* \* \* \* \*

“Q. (By Mr. Paine): That screw could be loosened by applying a wrench to it and loosening it up?

“A. Certainly.

“Q. Do you think it could be loosened by merely operation of the machine itself?

“A. Vibration; there’s a certain amount of vibration on those high speed engines.

“Q. And do you go around frequently and tighten it up, keep it tight?

“A. Well, probably not as often as we should have. I’ll admit that on my own part, but those machines are in continuous operation 24 hours a day and a good deal of the time seven days a week.

“Q. And they require a constant tightening of that screw; it should be kept tight?

“A. There’s lots of things that require tightening, and we do tighten them, absolutely, where it has to be done, absolutely necessary.” (Tr. 180, 181).

This particular witness testified on cross-examination that he made this examination the day of the accident

and that he discovered that the Pickering Governor Safety Stop had not "tripped", although he had had occasion to observe it just the day before when it had tripped. (Tr. 183). This characteristic of the Safety Stop on the Pickering Governor tripping at times and not tripping at other times was not only observed by Wheeler at the time of the accident, but his testimony in this respect was unequivocally corroborated by the representatives of the Insurance Company who investigated two days after the accident.

#### TESTIMONY OF INSURANCE COMPANY REPRESENTATIVES

Harry L. Olinger was the inspector of the Insurance Company who recommended that the Pickering Governor be equipped with the additional safety stop device that failed. (Tr. 266). He investigated the accident on July 5 and made three separate inspections of this Pickering Governor on the Sumner Steam Engine (Tr. 292). He could not understand himself why the Safety Stop on the Pickering Governor would work sometimes and not at others. (Tr. 293). Olinger tested the Safety Stop on the Pickering Governor two days after the accident in company with Wheeler four or five times and they could not make it work, (Tr. 276) although previously the Insurance Company representative had made it work. (Tr. 271).

That same afternoon he went back alone and still the Safety Stop on the Pickering Governor would not work.

"Q. Now, when did you go back, or did you do anything further that afternoon of the 5th?

“A. Well, after Mr. Wheeler and I tested that, and was looking around there, I still kept thinking about this governor, and wondering what was the matter, so I went back myself, alone, and started to re-set this and test it myself, and I couldn’t get it to trip either.

“Q. You couldn’t get it working?

“A. No.” (Tr. 277). (Tr. 293).

That evening his superior, Fred Fullmer, arrived and Olinger reported to him the results of these tests wherein the Safety Stop on the Pickering Governor worked sometimes and sometimes it did not. (Tr. 277).

Olinger in looking for a reason as to why the automatic Safety Stop on the Pickering Governor would sometimes work and sometimes would not never looked for any loose set screws. (Tr. 295). However, his superior, Fullmer, did look and did discover the loose set screw in the arm that was supposed to trip the mechanism of the Pickering valve. (Tr. 306). This completely corroborated the testimony of Wheeler of the Paper Company that at times the Safety Stop on the Pickering Governor would not trip and that when he, the first man on the scene after the accident, examined it, it was not in a tripped position. Olinger did not ask Wheeler about this when further investigation was made as to the condition of the Governor after the wreck, but he so informed the Paper Company, which in turn advised the Insurance Company on August 20 (Tr. 205) of what Fullmer himself had discovered on July 7. At that time, July 7,



Fullmer realized that a loose set screw would prevent the Safety Stop on the Pickering Governor from "tripping" and ordered a new screw, (Tr. 306) although the original screw was supposed to have been of a proper type. (Tr. 195). The District Court apparently failed to attach any importance to this testimony probably for the reason that the basis for his ruling was in part that even if the Safety Stop on the Pickering Governor had failed to work, the Brownell Overspeed Stop did work, or at least the Handpull Safety Chain worked so that the Butterfly Valve was closed partially. (Tr. 450, 451).

After Fullmer had made his investigation and before October 18, 1946, when the claim was formally denied by the Insurance Company, he reported to the Insurance Company that in his opinion the breaking of the Governor belt was the proximate cause of the loss and damage. (Tr. 324). Yet the District Court rejected all formal offers of proof that both the Spokane and Seattle representatives of the Insurance Company admitted on or about August 4, 1946, after investigation of the accident, that the proximate cause, in their opinion, was the breaking of the belt on the Pickering Governor. (Tr. 163, 164, 165, 166, 236 to 240). Such testimony would have shown the opinion of experts even if not binding upon the Insurance Company.

Almost a month after Fullmer's earlier investigation and apparently after his early report, Insurance



Company sent its representative, one Philip McKeon, from Hartford, Conn., to conduct certain tests on the Summer Steam Engine when the Paper Company's plant had been completely repaired nad the machinery in question renovated (including the loose set screw on the Safety Stop of the Pickering Governor and the Handpull Safety Stop) and operating under conditions dissimilar to those existing at the time of the accident. An objection was timely made to his testimony. (Tr. 344) and a motion to strike it into toto was denied. (Tr. 350).

### BUTTERFLY VALVE

Three days after the accident, on July 7, the Butterfly Valve was removed from the line by the Insurance Company and taken over to the machine shop. (Tr. 301). Four days after the accident certain tests were made by Insurance Company on the Butterfly Valve disconnected entirely from the steam line, calculated to show that the damper of the Butterfly Valve would not close even if the Brownell Overspeed Stop had operated normally at the time of the accident (which it did not). (Tr. 303, 327).

These tests purported to show that the reason the damper did not close 100% was that the packing surrounding the damper held it open one-eighth of an inch to three-fourths of an inch. (Tr. 303, 328). It is undisputed that these tests were conducted with the Butterfly Valve entirely disconnected at a time when the engine had no load on it, and was running free

because the damage hadn't yet been repaired to the line shaft. (Tr. 305). There were certain differences in testing the Butterfly Valve when it was disconnected and when it was under operating conditions.

(1) On the tests with the Butterfly Valve entirely disconnected from the steam line all loads were removed from the engine.

(2) However, under operating conditions the engine had to drive the line shaft and the belts and pulleys on each section of the proper machine. Thus there would be considerable friction load on the engine even when the individual clutches would be disengaged. The District Court apparently disregarded the undisputed testimony that the disengaging of the independent clutches on the machinery neither increased nor decreased the speed of the engine. (Tr. 114, 115) and would not take all loads off the engine as at the time of the "tests." (Tr. 305).

(3) These tests were conducted when the Butterfly Valve had been disconnected and idle for four days. The Butterfly Valve could not have been thoroughly warmed as it was in normal operation.

(4) The conditions under which the packing was tested with a comparatively cold valve were quite different than when the valve was hot under normal operation conditions. Even if the packing appeared stiff when the Butterfly Valve was tested, when it was cold for several days in the machine shop, that

was no true indication that it did not work perfectly free on the machine. Indeed, with a test of short duration, the Butterfly Valve could never be brought to a normal temperature and operating condition.

(5) According to the Insurance Company's testimony, it was only tested on one occasion, (Tr. 302, 304) and then the Insurance Company only tried once to stop the engine by tripping the Brownell and closing the Butterfly Valve. If it had been tested more thoroughly, the Butterfly Valve would have closed to one-eighth of an inch or 90% efficiency after it got warmer. It is undisputed that a Butterfly Valve of this type normally never closes to 100% and that one-eighth of an inch, or 90% efficiency, would have been enough to bring the engine to at least an idling stop. (Tr. 353, 354). The Master Mechanic, Beguelin, whose testimony was undisputed on the point, testified that the Butterfly Valve was 90% efficient and sufficiently tight to bring the engine to at least an *idling speed with all the load on*. (Tr. 350-354). Perhaps the significance of this testimony was not emphasized sufficiently to the District Court: that the Butterfly Valve, after the Brownell Overspeed Stop finally functioned by the moving engine belt coming in contact with its trigger, brought the engine to an idling speed even when there was no load on the engine, i. e., after the wreck had occurred and the line shaft was broken, and not the Safety Stop on the Pickering Governor.

We do not know what weight the District Court

gave to Olinger's testimony that Wheeler had told him one time that "they (meaning the Paper Company) had made paper for several hours with this Butterfly Valve in a closed position," but such narrative statements in any event would not have been binding upon the plaintiff. *Lever Bros. Co. v. Atlas Assurance Company*, 131 F. (2d) 770.

## II. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE SUPPORTING THE FINDINGS OF FACT, NOR THE DECISION OF DISMISSAL, WHICH WERE ENTERED, BUT AFFIRMATIVELY INDICATES THAT THERE WAS AN "ACCIDENT" WITHIN THE PURVIEW OF INSURANCE POLICY.

Because assigned errors (6) to (11) all depend on the predominant question whether or not the Paper Company introduced substantial evidence supporting its claim, these numbered errors will be considered together seriatim.

(6) The language used in the insurance policy evidently contemplated some fracture of some part of the engine. This occurred. The belt broke on the Pickering Governor, also the lever arms and the hub of the Butterfly valve were broken as the result of the violence of the pull on the Handpull Safety Chain by the employees upstairs at the time of the accident.

It was undisputed at the trial that the Handpull Safety Chain did not work to close the Butterfly Valve because the draw pin to which it was attached



was never pulled through the loops of the lever arms of the Butterfly Valve. (Tr. 124-125).

Because this was undisputed, the Paper Company did not offer further evidence at the trial itself *why* the Handpull Chain had *not* closed the Butterfly Valve and thus shut off the steam to the engine. (Italics ours).

After the adverse ruling of the Trial Court, when it was apparent that the Trial Court had decided the case on an entirely different theory than had been advanced by either the Paper Company or the Insurance Company, this further evidence was proffered: that the violence of the pull on the Handpull Safety Chain of the No. 4 Paper Machine, which was operated from the floor above, had in fact broken the lever arm casting that held the pin, and that was the reason why the hand release had failed to pull the pin from the loops of the lever arm and thus close the Butterfly Valve. (Affadavit of Fred Beguelin—Tr. 471). The Trial Court rejected this proffered evidence in denying plaintiff's alternate motion for a new trial or for entry of plaintiff's requested Findings and entry of appropriate judgment thereon.

Even the defendant below in his argument before this motion was made conceded that if a portion of the Butterfly Valve broke that would be covered by the policy. (Tr. 428).

(7) The Sumner Steam Engine did not overspeed due to some "undetermined cause." The proximate



cause was the belt breaking on the Pickering Governor, which was an "accident" within the terms of the policy. The term "accident" was defined in the policy as follows by Schedule 6, Paragraph C:

"C. As respects any object described in this Schedule, 'Accident' shall mean a sudden and accidental breaking, deforming, burning out or rupturing of the object or any part thereof, which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the object and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing, or shaft seal or diaphragm, shall not constitute an accident, nor shall the depletion of material in any part of the object, due to pitting, corrosion or wear, be construed as an accident."

This was the identical definition in the policy construed in *Ocean & Accident Guarantee Corp. v. Penick & Ford*, 101 F. (2d) 494. In that case there was the breaking of a copper strap and a fusing of its ends to the steel rotor which caused a ground in the rotor with a consequent impairment of function. While we have no case passing upon a similar question by the Circuit Court of Appeals for the Ninth Circuit, this decision from the Eighth Circuit is apropos to the extent that one of the principal questions at the trial was whether or not the occurrence in question constituted an accident within the meaning of the policy. It was there held that in determining the meaning of "accident" as used in machinery insurance against accidental breakdown, the question is

not what it might mean to a scientist or one skilled in the subject involved, but what it means to the average man. Here the belt of the Pickering Governor broke and a part of the Handpull Safety Chain. Not only was there a failure of substantial evidence supporting the decision of the Court that "the said Sumner Steam Engine overspeeded due to some undetermined cause which did not constitute an accident within the terms of said policy," but the record affirmatively showed an "accident" and what the cause was. What happened in logical sequence:

a. The proximate cause of the overspeeding of the insured Sumner Steam Engine was the breaking of its belt that drove its governor. The direct result of this overspeed was the damage to machinery directly attached to the engine and the adjacent premises. The speed of the insured engine was supposed to be kept constant for the purpose of making paper by a governor which was called a Pickering Governor. This Pickering Governor was driven by a belt. (Exhibit 12). This belt was a part of the engine and governor. This belt broke. (Tr. 209, 321-322).

b. After the belt driving the Pickering Governor broke, the safety stop on the Pickering Governor failed to function to prevent the insured engine from overspeeding. This safety stop had been placed upon the engine at the request of the insurance company, (Tr. 223, 224, 283) which recommended that the governor be fitted with a safety stop so that in case the governor belt should break, the governor valve would be closed automatically and the engine stopped from running away. (Plaintiff's Exhibits 15 and 17). However, this safety stop placed on the Pickering Governor to shut the steam supply off if the governor belt should break did not function at the time of the accident. (Tr. 209).

c. After the safety stop on the Pickering Governor failed, the Pickering Governor immediately opened wide overspeeding the insured engine and turned the line shaft pulleys and attached paper machine so fast (Tr. 98, 99, 77, 89-90, 94, 95, 111 and 112) that the pulleys on the line shaft and two pulleys on the paper machine upstairs burst. The line shaft was twisted and destroyed, and the plaintiff sustained damages in the amount of \$16,173.81. (Plaintiff's Exhibit 14).

d. After the belt of the Pickering Governor of the insured engine broke, and after its safety stop failed to function, the connected line shafting operated the No. 4 paper machine as one unit at a sudden and excessive speed just before the break up of the line shafting and the machinery. This sudden and excessive speed came and could only come from one source, the insured Sumner Steam Engine. (Tr. 77, 89-90, 94, 95, 98, 99, 111 and 112).

e. After the belt of the Pickering Governor of the insured engine broke, and after the safety stop of the Pickering Governor failed to function, the other two control devices of the insured engine also failed to function and stop the sudden and excessive speed of the engine. (Tr. 209, 321-322). These other two control devices were a Brownell Overspeed Stop and a Handpull Safety Chain. (Plaintiff's Exhibits 8, 9 and 10, Tr. 136, 124-125, 134-135). With only this type of stop, should this mechanism fail, serious results were bound to follow. (Tr. 283). This was the reason why the insurance company had recommended that the paper company put a safety stop on the Pickering Governor. (Tr. 223, 283, Plaintiff's Exhibits 15 and 16). Both of these control devices, the Brownell Overspeed Stop and the Handpull Safety Chain, were attached to the butterfly valve on the main steam line coming into the insured engine. Either control device was supposed to close this butterfly valve, (Tr. 196-197, 207-

208, 220-221) which operated like an old-fashioned damper on an old-fashioned wood stove, and was used for emergency closing of the main steam line. The Brownell Overspeed Stop was a mechanically operated stop on the flywheel of the insured engine which was supposed to operate automatically to shut off the engine when it attained a certain set speed, usually about 10% higher than the maximum paper making speed, while the Handpull Safety Chain, which was also attached to the butterfly valve, could be operated manually. (Plaintiff's Exhibits 8, 11, Tr. 191-192). The Brownell Overspeed Stop was supposed to operate automatically if the Pickering Governor failed and the engine overspeeded.

f. The Brownell Overspeed Stop had been set to shut the engine off automatically at about 277 revolutions per minute (R.P.M.), or at a corresponding speed for the attached No. 4 paper machine of 700 lineal feet per minute. (Tr. 196-197). At the time of the accident the Brownell Overspeed stop never functioned and the insured Sumner Steam Engine was going at least 800 R.P.M., or almost three times the speed at which the Brownell Overspeed Stop had been set, and the No. 4 paper machine was driven faster than it had ever before been driven at an estimated speed of 2,000 lineal feet per minute. (Tr. 77, 89-90, 94, 95, 105, 111, 112, 122-123).

(8) Everything which has been stated with respect to assigned error (7) can be repeated with respect to this error. The belt breaking on the Pickering Governor caused the accident. Appellant does not contend that the loose set screw caused the accident. The belt breaking on the Pickering Governor caused the accident, but the reason why the safety stop did not operate to shut off the Pickering valve *after the*



*belt had broken* was the loose set screw. Further, this loose set screw is the reason why the judgment was against the weight of the evidence in holding that "the safety stop on the Pickering Governor operated to bring the Sumner Steam Engine to an idling speed."

This was a physical impossibility. If the safety stop did not trip at all (which was the case here because of the loose set screw) after the belt of the Pickering Governor broke, the engine would have continued to increase its speed, not idle. If the stop did trip, it would have closed the valve on the Pickering Governor and would have stopped the engine entirely. This automatic safety stop could not be adjusted to an idling speed.

"Q. (By Mr. Paine): The Pickering governor stop; you can set that to either bring it down to an idling speed or bring it down to a full stop, couldn't you?

"A. I didn't think you could do that to the automatic stop. You can adjust the Pickering governor so that it controls the speed within a certain range, but if the belt breaks on the governor and the automatic stop functions, it closes the valve on the Pickering governor and shuts off the steam from the engine.

"Q. And if there's any leak from that valve it would escape through?

"A. In the Pickering valve?

"Q. Yes.

"A. I doubt if there would be enough to turn the engine over.

"Q. Even to keep it idling?



“A. Not even to keep it idling, through that valve. There might be enough leak through the butterfly to keep the engine operating.” (Tr. 251-252).

What brought the insured engine to a final stop was the shutting off of the steam in the main line within a few seconds of the break up after the run-away speed by the engineer who was present.

“Q. And what did you do after the machinery started breaking up?

“A. I hesitated just a moment, wondering whether I should go down and try to do something about the engine, but the steam and water was flying there, and I thought the only thing to do then was to go back around to the head valve which is on the east side of the machine, or east side of those two engines, over under number 2 machine, and on the catwalk over number 2 engine, shut off that steam line that runs to number 4.

“Q. In other words, if I follow, you ran over to the east side on a catwalk over the number 2 engine and shut off the main steam line that goes to the number 4 engine?

“A. That’s right.” (Tr. 98-99).

(9) The other control devices had not operated nor had the Butterfly Valve been closed before the damage.

## THE BROWNELL OVERSPEED STOP

The Brownell Overspeed Stop never functioned normally at the time of the accident, because the Sumner Steam Engine was going at least three or four times as fast as its running speed for the normal

paper making speed of 277 R.P.M. at which the Brownell Overspeed Stop had been set to operate. (Tr. 98-99). This excessive speed of the Sumner Steam Engine in turn drove the No. 4 Paper Machine faster than it had ever before been driven (Tr. 77-78, 89-90, 93-95, and 122-123) to a speed which one witness estimated was 2,000 lineal feet per minute before the machinery broke up. (Tr. 111 and 112). This was undisputed and conclusive proof that the Brownell Overspeed Stop never functioned normally at the time of the accident. Also it was undisputed that the maximum paper speed for the No. 4 Paper Machine was 690 and that consequently the Brownell Overspeed Stop should have operated on the Sumner Steam Engines when the No. 4 Paper Machine reached a corresponding speed of only 700 feet. (Tr. 191-192, 220-221).

There had been deliberate speed tests conducted prior to the accident by Insurance Company (Tr. 220-221) when the Brownell Overspeed Stop was set to stop the engine at a speed corresponding to 700 lineal feet per minute on the No. 4 Paper Machine. This paper speed of 700 lineal feet per minute was 10% higher than the maximum paper speed ever attained. (Tr. 74). None of the pulleys or the line shaft or any other machinery had ever been damaged by these previous overspeed tests when the Brownell Overspeed Stop had functioned at this paper speed

of 700 lineal feet. (Tr. 196-197, 207-208 and 220-221).

If the Brownell Overspeed Stop had functioned at the time of the accident, the speed of the Sumner Steam Engine would have been stopped when the No. 4 Paper Machine attained a paper speed of 700 feet, at which it was set, and that consequently the No. 4 Paper Making Machine would not have been driven as fast as the undisputed testimony by its workmen indicated it was, namely far in excess of 700 lineal feet per minute.

No evidence was offered by either party as to why the Brownell Overspeed Stop had failed to function.

However, it is undisputed that the Insurance Company regarded the Brownell Overspeed Stop alone as not a sufficient precaution to prevent a runaway speed to the engine and that an additional or independent stop on the Pickering Governor was felt by it to be necessary. (Tr. 223-225 and Ex. 15). Prior to the accident, the Insurance Company felt that if the belt on the Pickering Governor, as shown in Exhibit 8, were to break, a very serious situation would be created with respect to the runaway speed of the engine, (Tr. 283), and that an independent or automatic safety stop should be placed on the Pickering Governor. This had been done.

Before this automatic safety stop was placed on the Pickering Governor, the only precaution to stop the speed of the engine in case the belt broke had been the Brownell Overspeed Stop. (Tr. 284). The

Brownell Overspeed Stop was supposed to shut off the engine at less than 300 R.P.M.'s but at the time of the accident, the engine was going, according to an eye witness, one of the engineers in charge of it, at least 800 R.P.M.'s, or almost three times the speed at which the Brownell Overspeed Stop was set and supposed to shut off. (Tr. 105).

As has been stated, the Brownell Overspeed Stop was also supposed to work automatically and was supposed to operate the butterfly valve which would close the main steam line, shutting off the steam. At the time of trial, the Court apparently thought that the only way the Brownell Overspeed Stop could be tripped was by the centrifugal force of the flywheel of the engine operating the trigger. (Tr. 161). Because this trigger was found in a tripped position after the accident, the Court concluded erroneously that the Brownell Overspeed Stop had worked normally. The trial court further concluded that the butterfly valve had not closed completely, thus allowing sufficient steam from the main line to escape and to operate the engine at a runaway speed (Tr. 452). There is absolutely no testimony in the record that steam came through the butterfly valve after it was closed in any amount sufficient even to operate the Sumner Steam Engine beyond an idling speed when it was hooked up to the No. 4 Paper Machine by means of the main line shaft and pulleys above described, to say nothing of the terrific runaway speed it attained at the accident.



## HANDPULL SAFETY CHAIN

Much of what we have stated with respect to assigned error (6) can be repeated with respect to the Court's error in holding that the Handpull Safety Chain had operated to close the Butterfly Valve. This Court will keep in mind that none of the safety devices had functioned after the Pickering Governor belt broke, namely, the automatic safety stop on the Pickering Governor, the Brownell Overspeed Stop or the Handpull Safety Chain. The theory advanced by the Insurance Company was that the automatic safety stop on the Pickering Governor had functioned *after* the damage had occurred. But Trial Court's theory was that even if the automatic safety stop on the Pickering Governor did not function, either the Brownell Overspeed or the Handpull Safety Chain, or both, had functioned, closing the butterfly valve, but that there was enough steam coming through the butterfly valve nevertheless to cause the engine to run away. These two theories are diametrically opposed. There was absolutely no testimony in the record that the amount of steam which would come through the butterfly valve after it was closed would *even operate* the engine when it was hooked up to the paper machinery, much less overspeed the engine. On the other hand, the testimony of the Paper Company was that there had never been enough steam that leaked through the butterfly valve to operate the engine, (Tr. 181-182), and its master mechanic, who had been associated with the company for 23 years in charge and responsible for the machinery (Tr.



187-188) stated that he had never known of an instance of overspeeding with the butterfly valve closed. (Tr. 197-198).

(10) Everything that has been said in support of assignments of error (7), (8) and (9) is authority for arguing that the damage was caused by an accident to an object insured under the policy of insurance.

(11) We feel confident that this Court will not find it necessary to consider the motion for a new trial in disposing of this case, but we submit that if it is considered by the Court, the errors pointed out were so manifest that a new trial must be granted in any event.

## CONCLUSION

We are confident that this Court will agree with the position of the appellant that there was an accident, whether that term be taken in its ordinary layman's meaning or as defined in the policy, and that the Pickering Governor belt broke; that as a result of that breaking the insured engine speeded up and "ran away"; that the runaway speed accelerated to a point where it was communicated through the main drive belt to the line shaft and the machinery attached to the line shaft on the upper floor finally reached a speed that caused the pulleys to disintegrate through centrifugal force; that the District Court decided the case on a basis entirely unwarranted by the evidence, that is, he refused to believe the Brownell Overspeed Stop could be tripped in any manner other than centrifugal force (Tr. 360) and ignored an

overwhelming weight of evidence indicating that the runaway speed was far in excess of the point at which the Brownell was supposed to trip by centrifugal force, (Tr. 436) and thus erroneously placed a burden upon the appellant to prove why the Brownell Overspeed Stop had not tripped by centrifugal force. We likewise feel sure that this Court cannot but conclude, after an examination of the entire record, that the stipulated damages occurred as a result of the initial breaking of the Pickering Governor belt and that consequently recovery therefor is indicated under the provisions of the policy.

*Respectfully submitted,*

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No. 11908

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IN THE

United States  
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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INLAND EMPIRE PAPER COMPANY,  
a corporation,

*Appellant,*

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD, CONNECTICUT, a corporation,

*Appellee.*

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**Appellee's Answer Brief**

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*Upon Appeal from the District Court of the United  
States for the Eastern District of Washington*

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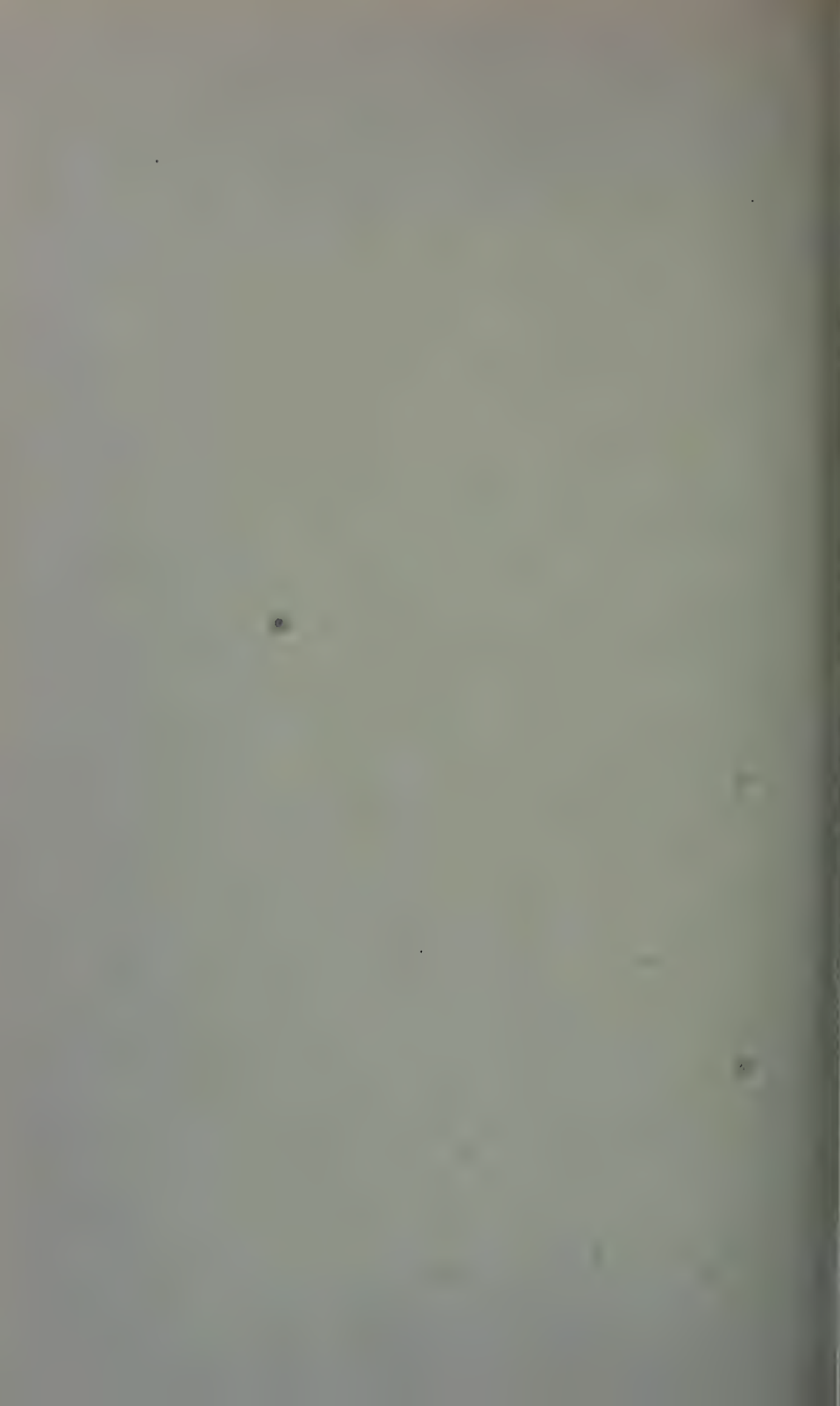
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No. 11908

IN THE

**United States  
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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INLAND EMPIRE PAPER COMPANY,  
a corporation,

*Appellant,*

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD, CONNECTICUT, a corporation,

*Appellee.*

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**Appellee's Answer Brief**

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*Upon Appeal from the District Court of the United  
States for the Eastern District of Washington*

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PAINE, LOWE AND COFFIN,  
ALAN G. PAINE,  
ALAN P. O'KELLY,  
*Attorneys for Appellee.*

## JURISDICTION

This action was brought by the Appellant Inland Empire Paper Company, a Washington Corporation, having its principal place of business in Spokane County, Washington, against the Appellee, The Hartford Steam Boiler Inspection and Insurance Company, a Connecticut Corporation, having its principal place of business in Hartford, Connecticut. (Tr. 3, 35). The action was predicated upon a policy of insurance issued by the Appellee covering, among other things, a Sumner steam engine owned and operated by the Appellant. The amount of the recovery sought was \$16,173.81, (Tr. 7, 8) no part of which claim was admitted, but all liability was denied by the Appellee. (Tr. 48). The amount in controversy was therefore \$16,173.81.

The action was originally commenced in the Superior Court of the State of Washington in and for the County of Spokane (Tr. 2). Upon due notice and upon compliance with all terms of the statute, the case was properly removed to the District Court of the United States for the Eastern District of Washington, Northern Division (Tr. 34-44).

Jurisdiction of the District Court existed under Sec. 41, Subdivision (1), Title 28, U.S.C.A., Judicial Code, Section 24 amended; and under Sections 71 and 72, Title 28, U.S.C.A., Judicial Code, Sec.'s 28 and 29 (amended).



The appellants have appealed from the final judgment denying relief to plaintiff entered January 16, 1948. Notice of appeal was served upon attorneys for respondents and filed on March 15, 1948 and a copy of said notice was mailed to attorneys for defendant the same date. (Tr. 489).

Jurisdiction of the 9th Circuit Court of Appeals to review the case is believed to exist under Sec. 225, Title 28, U.S.C.A., Judicial Code, Section 128, (amended).

### COUNTER STATEMENT OF THE CASE

On the 3rd day of July, 1946 there was in effect an insurance policy, Exhibits "A" and 18 herein, under the terms of which the defendant, Hartford Steam Boiler Inspection and Insurance Company, insured the plaintiff, Inland Empire Paper Company, against loss from an accident as defined in said policy to a Sumner steam engine located in the basement of the plaintiff's paper plant (Tr. 9) against loss on the property of the plaintiff directly damaged by such accident (Tr. 9) and against loss due to total prevention of business at said plant caused solely by an accident to said Sumner steam engine. (Tr. 23).

An accident is defined in the policy as "a sudden and accidental breaking, deforming, burning out or rupturing of the steam engine or any part thereof which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the steam

engine and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing or shaft seal or diaphragm shall not constitute an accident nor shall the depletion of the material in any part of the steam engine, due to pitting, corrosion or wear be construed as an accident." (Tr. 22-23).

The insured engine was attached by means of a belt to a system of pulleys, shafts and belts which carried the motive power of the engine up to a paper making machine on the floor directly over the Sumner steam engine. (Tr. 55-56). The insurance policy covered directly the engine and also covered parts of the paper making machinery, but did not cover directly the belting, line shafting and pulleys which carried this motive power from the engine to the paper machine. (Tr. 222-223).

On the 3rd day of July, 1946, while the Sumner steam engine was running at a normal speed making paper the Sumner steam engine, for some reason, increased its speed. None of the insured machinery was damaged in any way by this increase in speed, but the line shafting, belts and pulleys between the engine and the paper machine were damaged as alleged. The amount of damage to the plaintiff's property and the loss due to the interruption of its business is undisputed. The only dispute is as to the coverage.

In order for the plaintiff to recover anything, it was necessary, and the plaintiff has recognized that it was necessary, to prove, first, that there was an accident, as defined in the policy, to the steam engine and, second, that the line shafting pulleys and belt, which were uninsured, were directly damaged by such accident.

In order for the plaintiff to recover for its loss due to the prevention of business at the plant, it would be necessary for the plaintiff to show that the loss was caused "solely by an accident" to the Sumner steam engine.

There was no one in the basement near the steam engine at the time of the over-speed and there is no way of knowing positively what caused the over-speed. The sequence of events may be deduced only from circumstantial evidence, including the physical facts and the testimony of witnesses, which was consistent with those facts.

The vital facts are:

- (1) That there are numerous possible causes for an over-speed of a Sumner steam engine. (Tr. 258, 260).
- (2) That a belt driving the governor on the engine was found broken lying at the base of the machine after the accident. (Tr. 68-69).
- (3) That after the accident, the Sumner steam engine came back down to an idling speed and continued at an idling speed for some

minutes until the steam was shut off some minutes later. (Tr. 216).

- (4) That a Pickering governor stop which was designed to operate when the belt driving the Pickering governor broke, was so constructed that when it did operate, with no load on the engine, the engine was brought to an idling speed. (Tr. 354, 356, 288).
- (5) That no other control or device on the engine would have the effect of bringing the engine to an idling speed when there was no load on the engine; (Tr. 451-452) and,
- (6) After the line shaft, belts and pulleys were broken, and while the engine was observed idling at the conclusion of the sequence of events, there was no load on the Sumner steam engine. (Tr. 74, 154).

From this combination of circumstances the court concluded, and rightly, that the over-speed was from some unknown cause and that the over-speed continued until the governor belt broke, releasing the stop on the Pickering governor, thus bringing the engine back down to an idling speed.

In the trial court the plaintiff advanced the following theory: That the governor belt broke—that the Pickering governor stop which was supposed to operate upon the breaking of the governor belt failed to function and as a result the governor was opened and with nothing to counteract it, the engine continued to gain speed until the damage was done—that after the damage was done, the main drive belt tripped the trigger on the Brownell stop, released the butterfly



valve, allowed the weight on the butterfly valve to close the butterfly valve, thus bringing the engine down to an idling speed (Tr. 359-360).

## SUMMARY OF ARGUMENT

The Appellee's argument in this case may be divided into four main sections.

Section one will show that the trial court committed no error in its rulings on admission and rejection of evidence during the trial.

Section two will show that the trial court correctly found that the plaintiff had failed to sustain the burden of proving that its damage was due to an accident within the purview of the insurance policy involved. The court's conclusion and the defendant's conclusion was and is that the plaintiff's theory as to the sequence of events and the cause of the overspeed of the Sumner steam engine was incredible and not consistent with the known undisputed facts and that the defendant's theory of the sequence of events was much more reasonable and probable.

The third section will show that the Trial Court correctly denied the appellant's motion for a new trial.

The fourth section of the argument will show that there was no accident within the purview of the policy, even if the breaking of the belt driving the governor occurred at the beginning of the overspeed of the engine, rather than at the end.



The fifth section will show that even assuming that the belt broke at the beginning of the sequence of events and that the breaking of the belt could be considered an accident, the breaking was not the direct cause of the damage.

## ARGUMENT

### I.

Appellant's assignment of errors numbers one, two and four with respect to the admission and rejection of evidence need be noted but briefly. Appellant cited but one case, that of *Lasityr v. Olympia*, 61 Wash. 652, 112 Pac. 752. This case, as do all cases on this subject, states the rule very clearly that the trial court is vested with a large discretion in determining preliminary questions of facts upon which the admissibility of experiments depends and the court in the case cited, where the trial court had rejected the evidence, stated on page 657:

“While we are not prepared to say that it would have been error to admit proof of these experiments, we do not think that the quantity of light given out by an arc light at all times and under all conditions is so certain and unvarying as to render the ruling of the court erroneous, or manifest an abuse of sound judicial discretion.”

In the present case the trial court admitted the evidence, and the appellants have not shown that there was any abuse of discretion in so doing, particularly in a case tried without a jury.

There is a wealth of authority on the subject of the admissibility of experimental evidence as affected by similarity or dissimilarity of conditions collected in two notes, 8 A.L.R. 18 and 85 A.L.R. 479. With regard to a review in the Appellate Court the note in 85 A.L.R. summarizes the rule as follows: "In addition to the cases cited in the earlier annotation to the effect that the admission of evidence of experiments or permitting them to be performed in court, is a matter peculiarly within the discretion of the trial judge and that this discretion will not be interfered with unless it is apparent that it has been abused. The rule is supported by the following more recent decisions:"

85 A.L.R. 479, 482.

This rule is also cited in the case of *Lever Bros. Co. v. Atlas Assurance Company, Ltd., et al* 131 Fed. (2d) 770, 777. (Case cited by appellants on another point).

It should be pointed out, however, that Appellants have completely misconstrued the purpose of the experiments made on the Pickering governor in August. The admission of testimony with regard to those experiments had and could have had but one purpose and that purpose was to demonstrate that when the Pickering governor stop operates at a time when there is no load on the engine it does not completely stop the engine but reduces the speed of the engine to an

idling speed which was the condition of the engine when observed after the damage was done. This is of purely academic interest since this fact was definitely established by the Appellant's master mechanic. (Tr. 354, 356).

It should also be pointed out that counsel for the Appellant first made his objection to the evidence of the tests on the Butterfly valve after much evidence had already gone into the record concerning these tests. (Tr. 182, 183, 199, 304, 305).

Further, these tests were made jointly by representatives of the insurance company and employees of the Paper Company. There was no suggestion at that time that conditions were dissimilar or that they could more nearly simulate actual operating conditions. No testimony was offered at the trial that conditions were dissimilar—no testimony that the valve operates differently when it is cold than when it is hot—and no claim at the trial that removing the valve to inspect it and then replacing it in the line would affect its operation. It was definitely testified by Mr. Fullmer that an inspection of the valve showed that it was binding in the packing and would not close properly. (Tr. 301-303).

Appellant's third specification of error is also without merit. Prior to this offer of proof, Mr. Black, the Manager of the Appellant's company, had admitted that up to the time the insurance company denied liability the whole matter was in the discussion stage

and the decision was reserved as to whether or not the insurance company would assume this liability. Mr. Black also admitted that the first report of the Appellant company to the insurance company was that the belt had broken, causing the damage. It is also admitted that at the time the purported statements were made that the investigation had not been completed. (Tr. 238). It is not apparent whether appellant is urging this specification seriously or not. There is no authority cited as to why the opinion of these men would be relevant. The only reference made in appellants' brief is that such testimony would have shown the opinion of experts, even if not binding upon the insurance company. (App. Br. 31). Appellant had neither called nor qualified these men as experts nor has it shown that all the evidence was before the experts at the time they reportedly expressed their opinion.

Appellants also fail to urge very strenuously their specification of error No. 5. They cite no authority and give no grounds for the inadmissibility of the testimony. They merely quote the objection that was made at the time of the trial. The only valid objection possible would seem to be that it was hearsay. It was admitted on the basis that it was impeaching testimony. Mr. Wheeler, on direct examination, had testified that he didn't recall any circumstances where the paper machine had continued to operate fast enough to run the paper machine with the butterfly valve closed. He also testified that he didn't remem-



ber telling anyone from the Hartford Insurance Company that there were occasions where the paper machine had operated with the lever in a dropped position. (Tr. 181). The testimony objected to in specification 5 directly impeached the statements of this witness and it is clear from the court's remark cited in Appellant's brief (page 21) that this was the grounds on which the evidence was admitted and considered by the court.

Appellants' specification of error No. 6, that the district court had erred in rejecting testimony that part of the hand pull safety chain had broken can have no substance. This testimony was proffered after trial. It was not newly discovered evidence, and as a matter of fact the Appellants' counsel, in his arguments, indicate that he thought that he had put that evidence in during the trial. (Tr. 436). The trial court has wide range of discretion in admitting newly discovered evidence or further evidence in granting a new trial. As will be shown later in our arguments, under the Appellant's theory of the case during the trial, this evidence was irrelevant.

Appellant's specification No. 7 is also without merit. The expert witness put on the stand by appellant on cross examination stated definitely that there were many possible causes for an overspeed of a Sumner steam engine. (Tr. 258, 260). Some might be considered accidents and some might not be, but the appellant obviously didn't see fit to pursue the inquiry



further and allowed the testimony to remain in that state. The burden of proof being upon the plaintiff to show how the accident occurred, it would be the duty of the plaintiff to show that the accident occurred in the manner claimed and not in some other manner. In fact, where there are many possible explanations for an occurrence the trier of the facts should not be permitted to speculate as to which of the possible causes is the true cause.

*Fidelity & Cas. Co. of N. Y. v. Griner* (CCA-9) 44F (2d) 706.

*Senn Products Corp. v. Hartford Steam Boiler Inspection & Insurance Company*, 41 N.Y.S. (2d) 133.

Specifications Nos. 8 through 11 are formal objections to the entry of the judgment and will be considered together in the course of the narrative argument.

## II.

As was pointed out in the statement of the case, the plaintiff in the trial court advanced the following theory: That the governor belt broke, that the Pickering governor stop which was supposed to operate upon the breaking of the governor belt failed to function, and as a result the governor was opened and the engine continued to gain speed until the damage was done and after the damage was done the main drive belt flopped over and tripped the trigger on the Brownell stop, released the butterfly valve, allowed

the weight on the butterfly valve to close the butterfly valve, thus bringing the engine down to an idling speed.

In order to sustain their contention they would have to prove the following disputed propositions:

1. That the Pickering governor's stop had failed to function.
2. That when the men on the paper machine floor pulled the safety chain, the pin did not come out to release the butterfly valve.
3. That the Brownell stop failed to function when the engine reached the speed at which it was supposed to function.
4. That the driving belt danced around when it was released from the line shaft by the breaking up of the line shaft and pulleys, tripping the trigger on the Brownell stop, releasing the chain and allowing the butterfly valve to close.
5. That the effect of the butterfly valve closing would be to reduce the speed of the engine to idling speed at a time when admittedly there was no load on the engines since the pulleys and line shafting and belt which drove the paper machine were broken.

Actually it should be necessary only to disprove one of these propositions to disprove the plaintiff's entire case. If the Pickering governor valve had worked when the belt broke (assuming of course that the breaking of the belt started the sequence of events) there would have been no overspeed and no damage. If the pin which connected the chain from the Brownell stop to the butterfly valve had been pulled

out at the time that the workmen on the paper machine floor testified they pulled the pin, the butterfly valve would have closed at that time, rather than later when the dancing belt tripped the Brownell stop. Likewise, if the Brownell stop had operated at the time it reached the speed at which it was set, the Butterfly valve would have been closed at that time instead of later when the dancing belt knocked the trigger off the Brownell stop.

This is quite evident if we bear in mind the manner in which the butterfly valve and the apparatus attached to the butterfly valve worked. From Exhibit 8 it can be readily seen that the butterfly valve has attached to its hub one arm which, when the engine is in ordinary running condition, is horizontal and to the right of the hub of the valve. This is the weight attached to the butterfly valve which is frequently referred to and it is the only weight attached to the butterfly valve and the only motive force which can close the butterfly valve. Also attached to the hub of the butterfly valve is another arm which is pointed up and about 30 degrees to the left. Attached to this arm is the chain which holds the butterfly valve open and it is the only thing that counteracts the weight and holds the butterfly valve open. Whenever this chain is disconnected from the arm or whenever this chain is slack, the result is that the weight will drop down and close the butterfly valve. The pin which is attached to the safety hand pull which was also discussed at some length by the appellant is mere-

ly a connecting link between this chain and the arm on the butterfly valve. The chain, which is labelled No. 8, disappears from the exhibit in the lower left-hand corner. This is where the Brownell overspeed stop, discussed at some length, is located. The chain is there attached to a trigger arrangement which, when the Brownell stop operates through centrifugal force, releases the left end of the chain, slacks the chain, allows the weight, which is labelled No. 9, to drop, thus closing the butterfly valve. (Tr. 72).

The trial court found that it was highly unlikely that all of these things happened as claimed by the appellant and found as a matter of fact that it was most probable that none of these propositions was true. (Tr. 449-452). Appellants now ask the Circuit Court of Appeals to declare that this finding of fact by the Trial Court was "clearly erroneous." Rule 52 (a) Federal Rules of Civil Procedure. This case, like the case of *Wittmayer v. United States*, (CCA-9) 118 Fed. (2d) 808, is "pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses depends upon conflicting testimony or upon the credibility of the witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

*Wittmayer v. United States*, (CCA-9), 118 Fed. (2d) 808, 811.

The findings of the trial court based on evidence taken in open court will not be reviewed by an Ap-



pellate Court, except for plain or obvious error.

*Gila Water Co. v. International Finance Corp. et al* (CCA-9), 13 Fed. (2d) 1.

*Graff v. Town of Seward, Alaska* (CCA-9), 20 Fed. (2d) 816.

To prove their first proposition that the Pickering governor stop had failed to function, appellants put on the testimony of two witnesses—Mr. Wheeler and Mr. Janecek. Each of these witnesses claim to have examined this Pickering governor stop after the accident and found that it had not operated. The credibility of their statements was considerably shaken by the fact that Mr. Wheeler waited a month and a half before reporting what he had seen in this respect (Tr. 227-228) and Mr. Janecek waited almost two years before he ever said anything about it (Tr. 229), although both the appellant's and appellee's representatives had sought the answer to that question continuously from the time of the accident until the time liability was denied by the insurance company. The trial court also disbelieved this testimony because it was the only device which was shown to be capable of reducing the speed of the engine to an idling speed at the conclusion of the damage and that was unquestionably the condition of the engine at that time. The only witness who came forward at once with information on this subject was Mr. Beguelin, who arrived at 4:30 in the afternoon and noticed at that time that the device was tripped. (Tr. 196). All employees had been given orders not to touch anything. (Tr. 231-232).



Further, there was testimony by the same Mr. Wheeler that the day before the accident he had tripped the Pickering governor stop and it had operated properly. (Tr. 171-172). There is also testimony by Mr. Janecek and by the first representative of the insurance company to arrive at the plant, Mr. Olinger, that when Mr. Olinger first arrived he and Mr. Janecek tested the Pickering governor stop four or five times and it operated each time. (Tr. 140, 270, 271). It was not until a half an hour or more after this that it was first discovered that the Pickering governor stop would not work. (Tr. 276). To make this contention of the plaintiffs at all credible, one would have to assume that the Pickering governor worked and then at the crucial time when the accident occurred it did not work, then following the accident it worked four or five times then a half an hour later it did not work again and didn't work again until they tightened the set screw. Since the reason for the Pickering governor stop not having worked was supposedly a loose set screw it also must be assumed that the screw was tight and it loosened itself, then it tightened itself, and then loosened itself again. (Tr. 372, 374).

In its brief, page 41, Appellant places great reliance upon the testimony of its expert witness, Mr. MacAmy, who testified to the effect that the Pickering governor stop would close the steam off tight and stop the engine rather than allow it to idle. (App. Br. 41). Mr. MacAmy testified that he was merely

familiar with the Sumner steam engine in a "general way." (Tr. 243). He also testified that he had never conducted any tests on any of this equipment or examined it personally. (Tr. 256). On further cross-examination he also admitted that it was often customary to equip stops so that they did not slam the engine completely off, but could be fashioned so that the stop device merely allowed the engine to come down to an idling speed (Tr. 256) and finally he admitted that he did not know what the condition of the automatic stop on the governor was at the Inland Empire Paper plant. (Tr. 257).

Both Mr. Olinger, Inspector for the Insurance Company and Mr. Beguelin, master mechanic for the Paper Company, testified that the Pickering governor stop was designed to permit some steam to pass through when it was closed and thus allow the engine to idle. (Tr. 288, 357). This was also proved by the tests conducted on August 3, 1948 at which time the Pickering governor stop was operated and it brought the engine to an idling speed. (Tr. 315, 316, 332, 348).

The appellants also seek to sustain their proposition No. 2 that when the men on the paper machine floor pulled the safety chain the pin did not come out and release the butterfly valve by the testimony of Mr. Janeczek and Mr. Wheeler, and by an affidavit presented after the trial. Disregarding the affidavit for the time, the story that the pin had not pulled out was completely inconsistent with the story of the men on the second floor that they had pulled the chain a

foot or a foot and one-half up from the floor (Tr. 78, 81, 91) and the undoubted fact, testified to by Mr. Janecek and apparent in the exhibits that there is little or no slack in that chain (Tr. 134). It takes but a casual glance at Exhibit No. 8 to see that that chain could not come up a foot or a foot and one-half without coming out of its socket or without breaking something. There is no claim that the chain was broken. In addition, the report of the appellant to the respondent insurance company was to the effect that the first witness to see this pin was Mr. Coy, their engineer, and he had observed that this pin was pulled out. (Exhibit 13, Tr. 205). Appellants seek to escape the almost inescapable physical facts by presenting an affidavit that the arm on the butterfly valve was broken. Of course, it is difficult to conceive of this as being newly discovered evidence when the affiant was on the witness stand and had testified at the trial. However, the trial court rejected this evidence on the basis primarily that it was completely immaterial and irrelevant. As a matter of fact, it is more than immaterial and irrelevant, it completely shatters the appellant's entire case. If the arms of the butterfly valve are examined in Exhibit 8, it can be seen that if the chain pulled up a foot or a foot and one-half and pulled the arm off the butterfly valve, one of two things must have happened. If merely the arm attached to the chain were pulled off, it would allow the weight to drop and the butterfly valve would have been closed at that time as effectively as if the pin had pulled out of its socket. If

the pull broke off both arms there would be nothing left to close the butterfly valve and the butterfly valve would be even more effectively eliminated from the picture than under the appellee's view of the case. If the butterfly valve is thus eliminated, there is clearly nothing left to bring the engine down to an idling speed except the Pickering governor stop.

Incidentally, Mr. Wheeler testified that when he saw the engine after the damage, the butterfly weight was hanging down and from its outward appearance it was closed. (Tr. 181). It should also be pointed out that Mr. Beguelin's affidavit does not state when, after the accident, he found this arm broken.

The appellant has offered no evidence in support of its proposition No. 3 to the effect that the Brownell stop failed to function. There is no evidence as to why it would not function or any possible way in which it could fail to function. It is a very simple device which the trial court said that even a person with no mechanical ability could understand. (Tr. 450). It operates by means of centrifugal force pushing against a spring. There was much testimony as to tests conducted on it, both before and after the damage, and every test that was conducted on it demonstrated that it was in operating condition. (Tr. 451). No explanation was offered as to how or why the Brownell stop could have failed to function.

There seems to be some contention that if the Brownell stop or the hand chain had operated, the



engine, operating with a load on it, would not have reached a speed that would cause damage. However, it was testified that when the overspeed first commenced, at least two of the operators immediately disengaged clutches which threw some of the load off the engine. How much of the load was disconnected is perhaps conjectural, but it is established that the full load was not on the engine at the time of the breakup of the shaft and pulleys. (Tr. 81, 83, 111, 113, 114, 115).

Appellant seeks to establish proposition No. 4 that the driving belt bounced around when it was released from the line shaft by the breaking up of the line shaft and pulleys, tripping the trigger on the Brownell stop, releasing the chain, allowing the butterfly valve to close merely by expert testimony that this could happen. This is, of course, pure speculation.

One of the most vital points, however, of the entire case is proposition No. 5, that the effect of the closing of the butterfly valve would be to reduce the speed of the engine to idling speed at a time when admittedly there was no load on the engines since the pulleys and line shafting and belts which drove the paper machine were broken (Tr. 154). Appellants in attempting to establish this point on rebuttal called Mr. Beguelin, their master mechanic, and asked him what the effect of the closing of the butterfly valve would be on the engine when it was operating with paper machine running and in operation,—in other words with a full



load on it. He answered that it would continue to run at less than a dangerous speed. On cross examination he was asked the following question: (Tr. 357)

“Q. Without a load on it the engine would continue to gain speed?

“A. It takes very little steam to operate that engine with no load on it.”

It is obvious from the entire examination and cross-examination on rebuttal (Tr. P. 351 to 357) that Mr. Beguelin was in a very tight spot, with the interests of his employer balanced against his natural honesty. When the crucial question was put to him his natural honesty prevailed and he in effect admitted that without a load on the engine the engine would increase in speed with the butterfly valve closed.

How counsel for appellant can twist the words around and make them read backwards is very difficult to understand. Page 34 of his brief states that master mechanic Beguelin testified that the butterfly valve would bring the engine to at least an idling speed with all the load on (the words “idling speed with all the load on” in italics). In his next statement he says that it operated to bring the engine to an idling speed, even when there was no load on the engine. There was no such evidence presented and it is obvious that it will take less steam to operate an engine with no load on it than with a load on it. If there is any question on this, the testimony of Mr. Beguelin cited above bears this out, and Mr. Fulmer testified to the effect that the valve was binding in its packing and would

not close tightly enough to slow the engine down when it was operating without a load. (Tr. 301-303). This was substantiated by the tests conducted a few days after the accident when the representatives of the insurance company first arrived and were in a position to conduct tests. (Tr. 182-183, 199, 304-305, 327-330). Appellant's objection to the admission of these tests has been fully discussed. In so far as his objections might be construed as going to the weight to be accorded these tests, it should be pointed out that appellants made no showing why the taking of the butterfly valve out of the line, inspecting it and putting it back in the line, would make the tests essentially different from the conditions operating before. There is mentioned some sort of a theory that the pipes were not hot and that the butterfly valve would operate differently after the engine was warmed up, but there is no testimony or no evidence of any kind to support this contention.

It is undisputed that there were only three control devices, the Pickering governor stop, the handpull safety chain, and the Brownell stop. (App. Br. 5). Both the handpull safety chain and the Brownell stop merely operated to close the butterfly valve. (Tr. 70, 72).

The only other way that the engine could be in any way controlled was by manually shutting off the steam supply. At this stage of the proceedings it is difficult to tell whether or not the appellants have

abandoned their first theory and have adopted a new theory. On page 34 of this brief they make some point of the fact that the Butterfly valve brought the engine to an idling speed. Again, on page 42 they state "What brought the insured engine to a final stop was the shutting off of the steam on the main line within a few seconds of the breakup after the runaway speed by the engineer who was present." Of course the trial court inspected the premises (Tr. 51) and from an inspection of the premises it is obvious that it would take the engineer more than a few seconds to do what he claimed he did. Also the testimony of both Mr. Janacek and Mr. Black was that it was idling when they arrived at the scene. It is obvious from their description of where they were and where they had to go that it was more than a few seconds after the breakup that the steam was finally shut off. The testimony of Mr. Black establishes that it was at least ten or fifteen minutes after the breakup when the steam was shut off. (Tr. 69, 216).

There now also seems to be some intimation that the breaking of the butterfly valve could be the "accident" which would result in liability (App. Br. 36). There was of course no evidence of this properly before the trial court and as pointed out such position is entirely inconsistent with appellant's theory of the case.

Appellant also states that the trial court decided the case on a different theory than the Insurance

Company advanced (App. Br. 36). This statement has no foundation in fact. As may be seen by reading Appellee's argument to the court, the court adopted fully Appellee's version of the case. (Tr. 388-414).

In any event, there is clearly ample evidence to support the trial court's conclusion that the Pickering governor stop was the only thing that could bring the engine to an idling speed which was unquestionably the condition of the engine after the damage was done and if the Pickering governor stop had functioned, the belt must have broken after the damage was done rather than the breaking of the belt being the cause of the damage.

### III.

#### APPELLANT'S MOTION FOR A NEW TRIAL

At the conclusion of the trial, after entry of the judgment, the plaintiff made an alternative motion for a new trial, based upon all statutory grounds. (Tr. 469-470). The motion was argued and denied. (Tr. 485-486). The alleged errors of law have already been discussed. The only additional grounds for this motion were accident or surprise, which ordinary prudence could not have guarded against, or newly discovered evidence, material for the parties making the application, which they could not with reasonable diligence have discovered and produced at the trial. Attached to the motion was an affidavit of plaintiff's master mechanic, Fred Beguelin. (Tr. 471, 472).



He was present at the trial and testified both on plaintiff's original case and on rebuttal. There is nothing in the affidavit showing that this information had not been divulged to plaintiff's counsel prior to the trial and no excuse shown in the record for failure to offer it at the trial if it was of any material value. Therefore in no sense can it be considered accident or surprise or newly discovered evidence. Further, there is nothing in the affidavit to show when Mr. Beguelin discovered the break in the butterfly valve arm—whether it was immediately after the accident or some considerable time after. It is reasonable to assume that plaintiff did not present this evidence at the trial because if the facts as alleged were true, it would have been inconsistent with plaintiff's theory of the case. If the hand pull safety chain was violently pulled by the men on the floor above so that the lever arm was broken, this breaking would have the same effect as the pulling of the pin, by releasing the tension on the lever arm causing the weight arm to close the butterfly valve.

The granting of a new trial upon the basis of accident, surprise or newly discovered evidence is a matter peculiarly within the discretion of the Trial Court and his determination will not be disturbed unless there is an obvious abuse of this discretion.

*Spokane & I.E.R. Company v. Campbell*, 217 Fed. 518, 133 CCA-370, affirmed 36 Sup. Ct. 683, 241 U. S. 497, 60 L.ed. 1125;

*King v. Leech*, 131 Fed. (2d) 8;



*Roach v. Stastny*, 104 Fed. (2d) 559;  
*Cheaney v. Nebraska & C. Stone Co.*, 41 Fed.  
 740.

The affidavit seems to have been presented merely to substantiate testimony that the pin had not been pulled. If presented for this purpose it would be merely cumulative. A new trial should also be denied where the effect of the newly discovered evidence is merely cumulative.

*Viles v. Prudential Ins. Co. of America*, 107 Fed. (2d) 696; Cirt. denied 60 Sup. Ct. 387, 308 U. S. 626, 84 L.ed. 523. Rehearing den. 60 Sup. Ct. 582, 309 U. S. 695, 84 L.ed. 1035. Motion den. 61 Sup. Ct. 53, 311 U. S. 723, 85 L.ed. 471.

#### IV.

### THE BREAKING OF THE BELT DID NOT CONSTITUTE AN ACCIDENT

Although there is little room for doubt that the Trial Court correctly decided this case on the basis that the plaintiff did not prove that the breaking of the belt was the first event in the series of events, nevertheless it is felt that it should be pointed out that even if it did sustain its contention that the breaking of the belt was the cause of the damage, it would still not be entitled to recover.

The insurance policy involved covered only damage to the plaintiff's property which was caused by an accident to the insured object, the Sumner Steam Engine. Was the breaking of a leather belt an acci-

dent within the terms of the policy? The policy defining an accident states that an accident is a "sudden and *accidental* breaking, deforming, burning out, or rupturing of the steam engine or any part thereof. First, it would thus be necessary to show that the breaking of the belt was accidental. The word "accident" has been defined many times, not only in dictionaries but in numerous cases. While there are various combinations of words used in defining "accident," every definition of "accident" has in it the elements of unexpectedness—something that is unforeseen. The leading case is *United States Mutual Accident Association v. Barry*, 131 U. S. 100, 121, 33 L.ed. 60, 67, where the following instructions were approved:

"That the term 'accidental' was used in the policy in its ordinary popular sense as meaning happening by chance; unexpectedly taking place; not occurring in the usual course of things; or not as expected; that if a result is such as follows from ordinary means, voluntarily applied, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means."

This case was followed and part of the above language was quoted in the case of *Zurich General Accident and Liability Insurance Company v. Flickinger*, 33 Fed. (2d) 853, 854, 68 A.L.R. 161.

This same rule is followed in a fairly recent Washington case, *Hodges v. Mutual Benefit etc. Association*, 15 Wash. (2d) 699, 131 Pacific (2d) 937, where the Court states that

“An examination of all of our cases upon this subject demonstrates that an unusual, unforeseen agency or happening was present and unexpectedly caused the injury which brought each of these cases within the provisions of the policy of insurance.”

See also:

*Ocean Accident and Guarantee Corporation v. Penick and Ford*, 101 Fed. (2d) 493, 497;

*Senn Products Corporation v. Hartford Steam Boiler Inspection & Insurance Co.*, 41 New York Supp. (2d) 133, 136;

*Travelers' Indemnity Co. of Hartford, Conn. v. M. Werk Co.*, 33 Ohio App. 358, 169 N.E. 584.

If we examine the evidence presented in this case, we find that the breaking of this particular belt was neither unforeseen nor unexpected. It was a usual occurrence. Appellant's witnesses testified that they had a number of these belts hanging on the wall; that very frequently they took them down and changed them around, put them back on and took them off. They testified that the belt very frequently wore out and broke and that when this happened, they merely took another belt off the wall and put it on the machine. (Tr. 174, 224). Thus the belt is what might be considered an expendable part of the engine rather than a normally permanent one.

It may be compared to an automobile tire. When one runs an automobile for so many thousand miles the tire wears down to the cords and then the tire gives way and blows out, and no one considers the blowing of the tire an accident. It is true under certain circumstances the car might proceed to have an accident, but the blowing of the tire would be no accident—it is something that is foreseen and expected.

The policy and definition of “accident” further provides “nor shall the depletion of material on any part of the object due to pitting, corrosion or wear be construed as an accident.” In this case the belt undoubtedly wore down, was depleted, and finally broke as would be expected.

There is no direct evidence as to the age of the belt. A small piece of the belt is in evidence as defendant’s exhibit No. 12. If it should become important the trial court should, of course, make a finding of fact with respect to the age of the belt.

To keep clearly in mind the nature of the Appellant’s claim it is necessary to divorce the effects from the event which is claimed to be an accident. It is true, when you get a lot of breaking up of shafts and pulleys and some \$16,000 worth of damage, you consider that there has been an accident. But the accident has been to the pulleys and shafts. The company does not insure against an accident to the pulleys and shafts. If we assume that the pulleys and shafts had not broken and had not been damaged, and all



that had happened was the breaking of the governor belt, no ordinary man would have said that this engine was involved in an accident merely because the governor belt broke. It is highly doubtful that the Paper Company would have considered putting in a claim for the broken belt. There is no evidence that they had ever put in a claim for any belts that were broken prior to this.

## V.

### THE BREAKING OF THE BELT IF IT WAS THE INITIAL EVENT WAS NOT THE DIRECT CAUSE OF THE DAMAGE

Appellant has still another hurdle to get over before it is entitled to recover. Assuming that the breaking of the belt was the initial event, and that such breaking was an accident, within the meaning of the policy, still the appellant must establish that the damage was the direct result of the breaking of the belt. The policy provides that the defendant will pay "the assured for loss on the property of the assured directly damaged by such accident" and excludes "loss from any indirect result of an accident" (Tr. 9). The courts have construed the language "directly damaged" as synonymous with "proximately caused." In *Dixie Pine Products Company v. Maryland Casualty Company*, 133 Fed. (2d) 583, 585, court said:

"It is well settled that the words 'direct cause' ordinarily are synonymous in legal intentment with 'proximate cause,' a rule applicable to



causes involving the construction of an insurance policy.”

There are innumerable definitions of proximate cause in the cases and it would be futile to attempt to cite them all. We call the court’s attention, however, to a few. *Cole v. German Savings and Loan Society*, 124 Fed. 113, 115, court said:

“An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 952, 5 CCA 347, 350, 20 L.R.A. 582; *Railway Co. v. Kellogg*, 94 U. S. 469, 475, 24 L.ed. 256; *Hoag v. Railroad Co.*, 85 Pa. 293, 298, 299, 27 An. Rep. 653.”

In *Union Pacific Ry. Company v. Callaghan*, 56 Fed. 988, 993, court said:

“The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated.”

The Supreme Court of North Carolina said in *Clark v. Wilmington, etc., Railroad Company*, 14 S.E. 43, 47:

“If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.”

The Supreme Court of the United States declares:

“The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?” *Railway Company v. Kellogg*, 94 U. S. 469, 475, 24 L.ed. 256.

And again:

“The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones.” *Aetna Insurance Company v. Boon*, 95 U. S. 117, 130, 24 L.ed. 395.

The Circuit Court of Appeals for the Seventh Circuit holds that:

“The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof \* \* \* The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, ‘the intervener acts as a non-conductor, and insulates the negligence.’ The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition?” *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 405, 11 CCA 253, 258, 27 L.R.A. 583.

There is also a very carefully reasoned article in the Harvard Law Review, Vol. XXXIII, p. 633, entitled “Proximate Consequences of an Act.” The gist of the article, as it applies to this situation, is found in the following two excerpts:

“On the other hand, where defendant’s active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from the defendant’s act.” P. 651.

“The form of rule above stated is believed really to state the true distinction and the one actually enforced by the courts. \* \* \* A more accurate phrase which is gaining in use is that the intervening force, unless it is to make the result remote, must be foreseeable.” P. 652.

Applying these rules to the situation here involved, according to appellant's theory, we find the following: When the belt breaks, the rider pulley drops and the trigger pin is hit. That force is carried up to the ratchet spring and the safety device is operated. In other words, when the belt breaks, it sets in motion a force which causes the safety device to operate and shuts off the steam. This is the foreseeable and intended chain of events which would normally ensue. Appellant contends, however, that in this instance this normal chain of events did not ensue, but rather that the Pickering stop failed to function and the engine ran away instead of stopping. This, it says, was due to the fact that a set screw on the trigger arm was or had become loosened so that it slipped instead of turning and releasing the ratchet spring. This screw required frequent inspection and tightening. Appellant's engineer, Wheeler, testified as follows:

“Q. (By Mr. Paine): That screw could be loosened by applying a wrench to it and loosening it up?

A. Certainly.

Q. Do you think it could be loosened by mere operation of the machine itself?

A. Vibration; there's a certain amount of vibration on those high speed engines.

Q. And do you go around frequently and tighten it up, keep it tight?

A. Well, probably not as often as we should have. I'll admit that on my own part, but those machines are in continuous operation 24 hours a day and a good deal of the time seven days a week.



Q. And they require a constant tightening of that screw; it should be kept tight?

A. There's lots of things that require tightening, and we do tighten them, absolutely, where it has to be done, absolutely necessary." (Tr. 180-181).

The appellee's contention is that if appellant's theory is correct, then the direct cause of the engine running away and damaging the property was the failure of the Pickering device to operate due to the loose set screw which was caused by faulty maintenance and not by the breaking of the belt. The only foreseeable result in the breaking of the belt would be the stopping of the engine, but due to the interference of the loose set screw, the result did not follow from the initial force, but an entirely different result was brought about. To-wit: the over-speeding of the engine, but that was proximately caused by the loose set screw, a thing that was not covered by the policy of insurance.

In presenting this argument, we do not want to be understood as intimating that we believe this is what happened, but only wish to point out that even under appellant's theory, no set of facts has been shown that justifies recovery under the policy.

### CONCLUSION

As has been pointed out previously in this brief, this case presents solely a question of facts. The trial court made its finding based upon the evidence taken

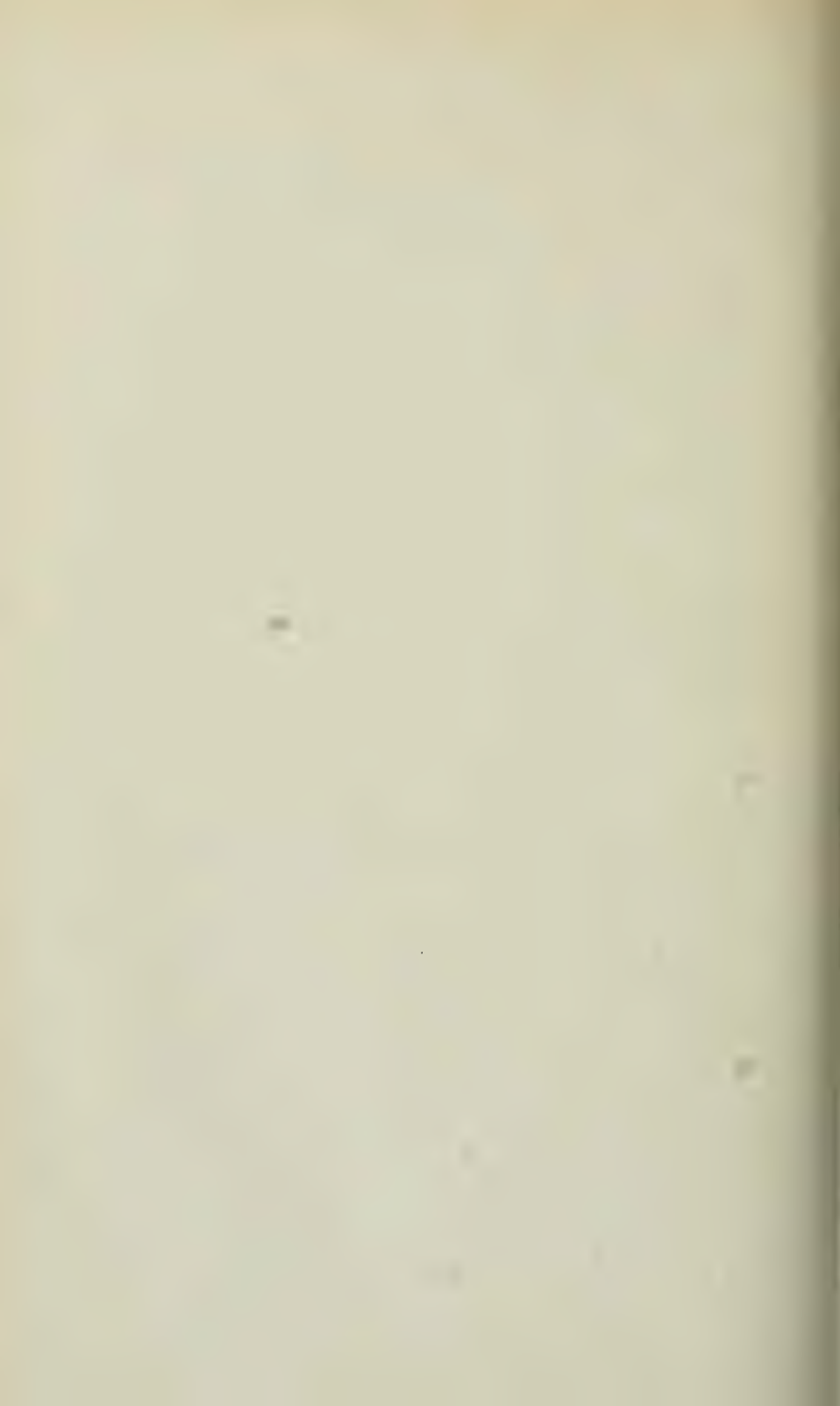


in open court which consisted of testimony of witnesses, as to what they had seen and observed, and certain physical facts and conditions. A good part of the testimony depended upon the interest, honesty and credibility of the witnesses, and in such case the findings of the Trial Court cannot be disturbed unless clearly erroneous. We respectfully urge that the findings of the Court, far from being clearly erroneous, were sustained by the overwhelming weight of the evidence and were the only ones which could have been entered. It was undisputed that the Sumner Steam Engine came down to an idling speed before the steam was shut off; that there were only two devices which could accomplish this—either the butterfly valve or the Pickering safety stop. If the Pickering Safety Stop was the device that caused the engine to come down to an idling speed, then it must have operated at the end of the sequence of events and would not be a direct cause of the damage, but would in fact be the thing that stopped the damage from being greater than it was. The Court properly found this to be what happened. The evidence showed clearly that the butterfly valve failed to close due to an inherent defect in the butterfly valve itself. The two devices, namely the hand pull chain and the Brownell stop, which were designed to cause the butterfly valve to close, must both have functioned, as there was undisputed testimony that the hand lever was pulled and no possible reason or theory was advanced as to why the Brownell stop would not have operated when the fly wheel attained the speed which it did.

The Court also did not err in admitting the testimony objected to, as this evidence constituted the examination of certain physical objects, which was entirely proper and the conducting of tests upon them by both parties to the action under similar conditions. Testimony as to the tests had also previously been given by the plaintiff's own witnesses without objection on the part of the plaintiff. Further, we believe that even if the Trial Court's findings of fact were erroneous, the plaintiff would not have been entitled to a judgment because the breaking of the belt was neither an accident within the meaning of the policy or, if it were such an accident, it was not the direct cause of the damage. For these reasons we respectfully urge that the judgment of the Trial Court is correct and should be affirmed.

*Respectfully submitted,*

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No. 11908

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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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INLAND EMPIRE PAPER COMPANY,  
a corporation,

*Appellant,*

vs.

HARTFORD STEAM BOILER INSPECTION  
AND INSURANCE COMPANY OF HART-  
FORD, CONNECTICUT, a corporation,

*Appellee.*

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**Reply Brief**

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*Upon Appeal from the District Court of the United  
States for the Eastern District of Washington*

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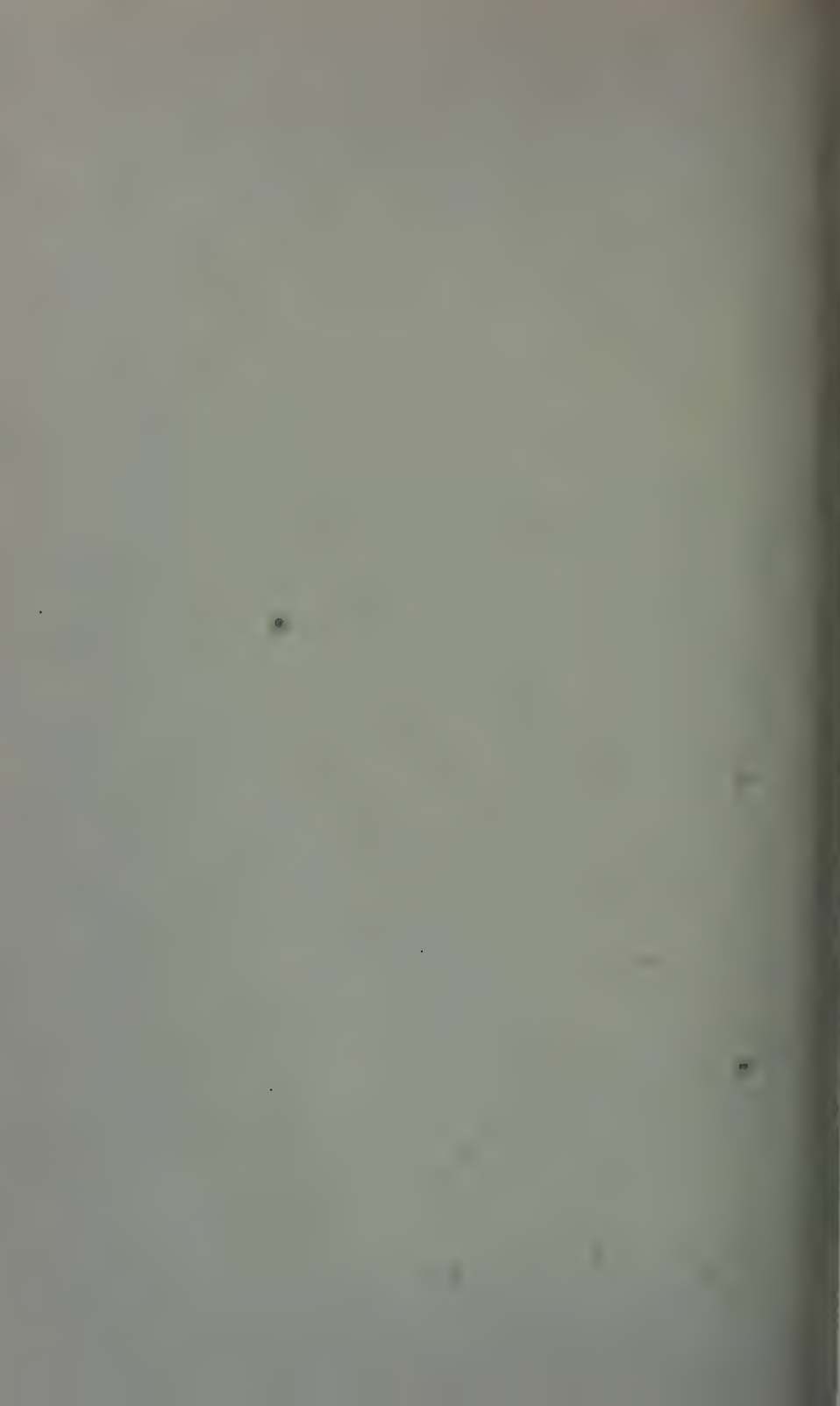
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PAUL P. O'BRIEN





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Appellee's answering brief is a medley of assumptions and statements of supposed facts, which find no support in the record. For example, appellee does not attempt to answer, and cannot answer from the record the logical sequence of this accident as set forth on pages 38, 39 and 40 of appellant's brief. This Court will note that each step in this sequence refers to the pages of the record. Appellant Paper Company desires this brief to be of assistance to this Court in deciding from a review of the rather voluminous record whether appellant sustained the burden of proof that there was an accident within the purview of this insurance policy. Accordingly, this brief will be strictly in reply to the order of the discussion of the case by appellee in its brief.

The six "vital facts" set forth by appellee will be considered in that order.

1. The cited portions of the record, Tr. 258-260, do not support the bald statement that "There are numerous possible causes for an overspeeding of a Sumner steam engine." There was no other possible cause of overspeed in the entire record except the broken belt and the Insurance Company never named any. While the burden of proof never shifts, the Paper Company, plaintiff in the Trial Court, made a *prima facie* case so that the burden of going forward did shift. Appellee Insurance Company did not offer any cause for the overspeeding. The finding of the Trial Court was that the overspeeding was due to "some undetermined cause" which was never

named in the entire record. (Finding of Fact No. 3, Tr. 465). The cited portion of the record shows that after the belt broke, the overspeed resulted from a failure of the controls of the engine. The portions of the record cited by appellee Insurance Company are as follows:

“Q. This overspeed is caused by, may be caused by a number of things getting wrong with the governor, isn’t that right?

“A. Getting wrong with the controls of the engine.

“Q. The breaking of the governor belt from the engine to the governor is only one of many things that might set off an overspeed condition, isn’t that so?

“A. Well, the failure of the governing devices would cause an overspeed condition.” (Tr. 258).

These controls are the Brownell overspeed stop and the handpull safety stop, both of which operate the Butterfly Valve. (Ex. 8, 9, and 10; Tr. 136, 124-125, 134-135). The specious argument of appellee Insurance Company overlooks the fact that these governing devices might have been defective, but nevertheless their defective condition would not have made any difference if the belt of the Pickering governor had not broken in the first place. In other words, if the Pickering governor had functioned to keep the paper speed constant at all times the way it was supposed to, it would not have made any difference if there were no other controls. The following misleading and disjunctive question was asked on cross-examination and

is apparently the basis for appellee's whole argument:

Recross-examination by Mr. Paine:

“Q. But those can take place without the breaking of the governor belt;”

(The witness had been speaking of the failure of the governing devices, i. e., safety stop on the Pickering governor, Brownell overspeed stop and hand-pull safety chain, but counsel then joined that up with the following)

“that is just one of the things that might happen and cause the overspeed?” (Tr. 258).

(Counsel now talking about the breaking of the belt of the Pickering governor, but the witness answers “Yes” to the first part of the question).

2. The belt driving the governor on the engine was found across the frame underneath the governor. One end was across the frame, (Tr. 68-70) and not at the base of the engine.

3. The Sumner steam engine did continue at an idling speed for some minutes after the break-up of the machinery.

4. The Brownell overspeed stop would also bring the engine to an idling speed. (Tr. 196-201, 357).

5 and 6. The cited portions of the record, Tr. 451-452, simply refer to the mistaken opinion of the Trial Court and not the testimony of any witness. These cited portions are in direct contradiction to the fol-

lowing evidence of appellant Paper Company's master mechanic, who had been associated with the Paper Company for 23 years in charge of and responsible for the machines, (Tr. 187-188) who testified that the Butterfly Valve was 90% efficient and sufficiently tight to bring the engine to at least an idling speed even with all the load on.

"Q. Mr. Beguelin, I believe you've been sworn before. Mr. Beguelin, if the number 4 paper making machinery is engaged upstairs, and this Pickering governor on the Sumner steam engine in the basement trips, what effect does that have on the Sumner steam engine? \* \* \*

"A. It would shut the supply of steam off from the engine.

"Q. And the engine would stop?

"A. It would, it should, stop.

"Q. Almost immediately?

"A. Very, very rapidly." (Tr. 351-352). \* \* \*

"Q. Well, how close would this Butterfly Valve normally close?

"A. Oh, I would say 90 per cent, something like that.

"Q. Would the Butterfly Valve have stopped the machine at the time of the accident if it was in the condition in which Fullmer brought it up to your shop after the accident?"

(Wholly disengaged from the line, that is, with no load on).

"Mr. Paine: I object to that as a mere conclusion. The facts are in evidence as to what it did or didn't do.

"The Court: I've forgotten, there's been so



many witnesses, what his qualifications are, as an expert.

“Mr. Paine: He’s only the master mechanic.

(But see counsel’s remarks at page 193 of Tr.)

“Mr. Kelley: He’s the master mechanic, if the Court please.

“The Court: I’ll overrule the objection. He can testify in his opinion what it would have done.

“A. Well, I believe that would have stopped the engine, or slowed it down to less than a dangerous speed, at least.” (Tr. 353-354).

In other words, the Butterfly Valve would have the effect of bringing the engine to an idling speed. Furthermore, the Pickering governor stop would have operated automatically to stop the engine. This Pickering governor stop could not be adjusted to an idling speed. Appellee wholly ignores the record itself (Tr. 251-252, which is set forth on pages 41 and 42 of appellant’s brief) and cites instead the mistaken opinion of the Trial Court (Tr. 451-452) which was indeed contrary to that record.

There is no testimony in the record that the Butterfly Valve could not bring the engine to an idling stop without a load at the time of the accident; the conditions at the test were wholly different from those prevailing at the time of the accident.

- (a) The condition of the packing was comparatively cold.
- (b) The condition of vibration due to the operation of the machinery itself was absent.

When the test was made everything was quiet and there was no pulling and there was no vibration.

There was no other way the steam engine could get excessive speed except by the belt of its governor breaking. Appellee Insurance Company cannot point to any other possible way that the governor could have failed.

## I.

### APPELLEE'S ARGUMENT WITH RESPECT TO ASSIGNMENT OF ERRORS NOS. 1, 2 AND 4.

We are not concerned with the purpose of the Insurance Company in its experiments made on the Pickering governor in August. Just because the Pickering governor stop would bring the engine to an idling stop is no proof that the Pickering governor stop was the thing that did bring the engine to an idling stop. The Butterfly Valve could and did bring the engine to an idling stop regardless of the tests of "purely academic interest" made after the accident. The "trigger" of the Brownell overspeed stop could operate to close the Butterfly Valve as well as centrifugal force. This trigger, which could be tripped by hand, was only about one-half an inch away from the main belt of the Sumner steam engine to the line shaft pulleys (Tr. 188). Several years before the accident, this main engine belt (not to be confused with the belt of the Pickering governor) had been weaving from side to side on its pulley and because of its close juxtaposition to this trigger had tripped

the trigger of the Brownell overspeed stop. (Tr. 198-199). This main belt of the insured engine, during the overspeed of the accident in the case at bar, had become very loose and the pulley on which it was attached had been pulled forward towards the north approximately 8 to 10 feet by the explosion, so that it must have moved sideways at the time of the overspeed and must have hit the trigger because it was slack. (Tr. 188-189). Furthermore, after the wreck, the Brownell overspeed stop was found in a tripped position and it is undisputed that it did not work automatically by centrifugal force at 277 R.P.M., at which point it was supposed to work, because the engine went three times as fast before the explosion.

With reference to Fullmer's testimony on the point, all Fullmer's testimony amounted to was that the Butterfly Valve would not close 100%, but as has already been pointed out on page 34 of appellant's opening brief, a Butterfly Valve of this type normally never closes 100%, although this particular one in closing to one-eighth of an inch would have been enough to bring the engine to at least an idling stop. (Tr. 353-354). Furthermore, the test after the accident of the packing was made under cold conditions.

The case of *Fidelity Cas. Co. of N. Y. v. Griner*, 44 F. (2d) 706, cited by appellee Insurance Company is not in point at all. If it is at all apropos, it is authority for appellant Paper Company to this extent: Appellee Insurance Company makes the claim that there may "have been many possible causes for the

overspeed." The cited case would hold that the burden was not on the appellant to raise all these causes and then to negative all the possibilities. Rather the case would indicate that the burden was sufficiently met by the appellant Paper Company when it established the broken belt as the cause of the overspeed. As was shown in part through the cross-examination of Insurance Company representative, Olinger, the undisputed facts are:

1. The governor was a part of the Sumner steam engine.
2. The belt was a part of the governor. (Ex. 12 was that belt.)
3. That belt was broken.
4. The broken belt prevented the continued operation of the Pickering governor.
5. The broken belt immediately impaired the functions of the Pickering governor.
6. The belt would have to be replaced before the operation of the Pickering governor could be resumed or its functions restored.

What else could have caused the overspeed of the engine?

## II.

Appellee Insurance Company also states five "disputed" propositions which it insists that appellant Paper Company must prove in order to sustain the burden of proof. Appellant Paper Company submits that these propositions have been proved beyond dis-



pute and herewith sets forth these five propositions together with the specific portions of the record dealing with them with the thought that the record itself will be the most persuasive argument with this Court on these five points:

“1. That the Pickering governor’s stop had failed to function.” Testimony of Wheeler, engineer and operator for the Paper Company, who came on shift a short time after the accident. (Tr. 171, 178-179). Testimony of Insurance Company representatives who investigated two days after the accident. (Tr. 266, 271, 276, 292, 293, 295, 306, 324).

“2. That when the men on the paper machine floor pulled the safety chain, the pin did not come out to release the Butterfly Valve.” Testimony of superintendent of appellant Paper Company who came to the scene of the accident immediately. (Tr. 124-125). Testimony of workmen who pulled the handpull stop without stopping the engine, (Tr. 80-81) and affidavit of Fred Beguelin explaining why the pin did not come out in support of the motion for new trial. (Tr. 471-472).

“3. That the Brownell stop failed to function when the engine reached the speed at which it was supposed to function.” Testimony of master mechanic that Brownell was set for 700 feet paper speed. (Tr. 191-192). Testimony of manager of appellant Paper Company that Brownell stop had always functioned at that point before. (Tr. 220-221). Testimony of four different workmen and the superintendent of



appellant Paper Company as eye witnesses, that the engine was going three or four times as fast as that speed for which Brownell was set. (Tr. 77-78, 89-90, 93 to 95, 98-99, 111-112 and 122-123).

“4. That the driving belt danced around when it was released from the line shaft by the breakup of the line shaft and pulleys, tripping the trigger on the Brownell stop, releasing the chain and allowing the Butterfly Valve to close.” Testimony of master mechanic of appellant Paper Company that even during normal operations the main engine belt had tripped the trigger of the Brownell overspeed stop. (Tr. 198-199). His testimony that under abnormal operations after the explosion this could have happened because the main belt was so close. (Tr. 188-189).

“5. That the effect of the Butterfly Valve closing would be to reduce the speed of the engine to idling speed at a time when admittedly there was no load on the engines since the pulleys and line shafting and belt which drove the paper machine were broken.” Testimony of general manager of appellant Paper Company that the engine was idling. (Tr. 216). Testimony of master mechanic of Paper Company. (Tr. 251-252).

Appellant Paper Company proved the above five propositions and there was no conflicting testimony on these points, and appellee Insurance Company has been able to cite none in its brief. Appellant has no quarrel with the cases cited by appellee Insurance

Company holding that the finding of the Trial Court will not be reviewed except for plain or obvious error, but in the case at bar the judgment was against the weight of the evidence. The handpull safety chain could not have operated the Butterfly Valve to shut the engine down to an idling speed. This was against the physical evidence. After the chain attached to the handpull stop was pulled, the engine went even faster.

Yet the Trial Court held "Now both the Brownell stop and the hand stop up above operated on this Butterfly Valve." (Tr. 452). The Brownell operated only *after* the damage had occurred, after its trigger was struck, but the Handpull stop never operated. The Handpull stop broke. This was part of the engine which was covered by the policy. The Trial Court apparently disregarded the testimony of Janecek that the pin "didn't quite pull clear out," (Tr. 125), but should not have ignored the testimony to the same effect given by the workmen who pulled the Handpull stop without stopping the engine (Tr. 80), and who testified that this was done at least twice without result and that the break-up of the machinery only occurred after these two pulls (Tr. 81), or of the master mechanic (Tr. 201). Appellant Paper Company could not foresee how the Trial Court could possibly hold that the Handpull stop had worked in view of this uncontradicted testimony, but when the Trial Court did so rule, then the new physical evidence as to *why* the Handpull stop did not work was proffered. This new physical evidence was of the broken lever arm casting. If the Trial Court had

considered this new physical evidence and reopened the case to receive further testimony to show how it was physically impossible for the Handpull stop to have operated the Butterfly Valve, no such ruling as appears at Tr. 451 would have been made. Even the appellee Insurance Company would concede this according to its argument (Tr. 408) and its brief when it states that "it takes but a casual glance at Ex. 8 to see that that chain could not come up a foot or a foot and a half without coming out of its socket *or without breaking something.*" (Italics ours). The lever arm casting was broken. (Affidavit of Beguelin. Tr. 472).

There is no testimony in the record, nor does Beguelin's affidavit state that the arm "was pulled off." It was broken in the hub and held together, and Ex. 8 shows the triangular web which was placed at that hub.

Mr. Wheeler's testimony that when he saw the engine after the damage, the butterfly weight was hanging down and from its outward appearance closed (Tr. 181) was entirely consistent because *after* the accident the Brownell trigger was tripped. The Brownell trigger released the Butterfly Valve, not the Handpull safety chain.

Later on in its brief appellee Insurance Company states without citation from the record "If the Butterfly Valve is thus eliminated, there is clearly nothing left to bring the engine down to an idling stop except the Pickering governor stop." Appellee again ignores

the undisputed fact that the Brownell stop also operated the Butterfly Valve and that the Brownell stop operated not only automatically by centrifugal force but by manual contact with a trigger which is shown in Ex. 11, being a closeup of this Brownell overspeed stop. The Trial Court ignored the following testimony which at least made a prima facie case as to what operated the Brownell stop, which in turn closed the Butterfly Valve:

“Q. State whether or not that would be in close juxta-position to the trigger that I’m indicating on Exhibit 11?

“A. Yes, it would.

“Q. If you know, about how far is that trigger from the main pulley there that the main belt is driving?

“A. Well, it’s dead in line, I think almost exactly in line, with the face, and perhaps half or three-quarters of an inch away from the rim.

“Q. Could this main belt have hit the trigger by the fact that it was slack?

“A. It could.

“Q. Now, that trigger operates what is known as the Brownell overspeed stop?

“A. That’s right.” (Tr. 189).

The Trial Court erroneously placed the burden on the appellant to prove *why* the Brownell overspeed stop would not work by centrifugal force when it was the position of the Paper Company that the Brownell overspeed had been worked at the time of or after the breakup of the machinery by the belt coming in con-



tact with the trigger. The Trial Court said, "There hasn't been any explanation as to why it" (the Brownell overspeed stop) "didn't work. There has been shown to have been no defect in it." (Tr. 450).

Appellee Insurance Company further states in its brief "Incidentally, Mr. Wheeler testified that when he saw the engine after the damage, the butterfly weight was hanging down and from its outward appearance it was closed." (Tr. 181). Mr. Wheeler's testimony is consistent, because after the accident the Brownell trigger was in a tripped position and consequently had closed the Butterfly Valve. There is a wealth of evidence, as we have cited, that the Brownell stop failed to function normally by centrifugal force as shown by the fact that the insured Sumner steam engine was going at least 800 R.P.M., or almost three times the speed at which the Brownell overspeed stop had been set, and the No. 4 paper machine was driven faster than it had ever before been driven at an estimated speed of 2,000 lineal feet per minute. (Tr. 77, 89-90, 94-95, 105, 111-112 and 122-123). It was manifest error to rule that appellant Paper Company had to produce evidence *why* the Brownell didn't operate by centrifugal force. It did operate later by manual contact with the trigger. The master mechanic Beguelin did not testify that the engine under normal operating conditions would increase its speed with the Butterfly Valve closed. (Tr. 197-198).



## III.

## “APPELLANT’S MOTION FOR NEW TRIAL”

If the Trial Court had opened the judgment and taken additional testimony (as was moved by the appellant Paper Company under *Rule 59 of Civil Procedure for the District Court*) as outlined by Begue-lin’s affidavit, for example, that the “triangular web” piece that appears as (3) on Ex. G of his affidavit, (Tr. 472) was an additional piece that had to be welded on the broken lever arm of the Handpull Safety chain by the Paper Company after the accident, there wouldn’t have been any necessity for this appeal, because it would have been apparent *why* the Handpull Safety stop did not operate to close the Butterfly Valve and bring the engine to an idling stop. This was accomplished at the time of the breakup by the “trigger” of the Brownell being hit by the main engine belt. The Trial Court denied appellant’s motion, although at the time of the trial he had said, “We also have to assume, which has been pointed out here as *rather improbable, to me*, that although this Hand Safety stop had been set up, connected with a chain to the Butterfly Valve extending up into the upper room, where the paper machine was operating, a convenient handle in the floor, the men evidently had been instructed about it, knew it was there, and when this evidence of speeding was noticeable they ran over and they pulled that, and no doubt *pulled it violently and in a way that should have made it work.*”

Now, we have to assume that that didn't work, and then we have another point here." (Tr. 451). (Italics ours).

## IV.

"THE BREAKING OF THE BELT DID NOT CONSTITUTE  
AN ACCIDENT"

The language used in the policy evidently contemplated some fracture of some part of the engine. This occurred. The belt of the Pickering governor broke. The lever arm of the Handpull Safety chain also broke. The term "accident" was defined in appellee Insurance Company's policy by Schedule 6, paragraph (c) to cover these events.

## V.

"THE BREAKING OF THE BELT IF IT WAS THE INITIAL  
EVENT WAS NOT THE DIRECT CAUSE OF  
THE DAMAGE"

It would not be helpful to this Court to discuss the cases cited by appellee Insurance Company which are wholly dissimilar in fact and not at all in point. We endeavored to review the authorities before trial, and we informed the Trial Court (Tr. 375) that we had not been able to find any case other than *Ocean & Accident Guarantee Corp. v. Penick & Ford*, 101 F. (2d) 493, that came near the instant problem. After considering those cited by appellee Insurance Company

with the exception of the *Ocean & Accident Guarantee Corp. v. Penick & Ford* case, which is also cited in appellee's brief, this court will observe that no other authority has been cited in point. This Court will observe from this record that the safety stop on the Pickering governor had been placed on the Pickering governor to stop the engine in the event that the belt of the Pickering governor broke. This had been so placed on the specific recommendation of the Insurance Company itself (Tr. 192-193, 223-224, Ex. 8, 15, 16 and 17). Prior to the time that the safety stop on the Pickering governor had been put on the insured engine, the only thing that would have stopped the engine in case of the belt breaking was the Brownell overspeed stop. (Tr. 223-224). Under such a theory advanced by appellee Insurance Company that the breaking of the belt was not the proximate cause of the accident, if any insurance company can get an assured in the position of the appellant Paper Company to install a safety device, such as the safety stop on the Pickering governor, for a part of the insured machinery, then the insured could never recover for an "accidental breaking" of that part because if the safety device which the insurer persuaded the insured to put on worked, there would be no damage. On the other hand, if the safety device, such as the safety stop on the Pickering governor, did not work, whether it be due to a loose set screw or for any other reason, there could never be any proximate cause within the purview of the policy and hence no recovery. Such an argument would be contrary to public

policy and the well established principle that an insurance policy is supposed to protect the insured.

## CONCLUSION

The other portions of appellee's brief to which we have not replied do not really dispute appellant's theory. To answer all of appellee's contentions made without support of the record would only be to repeat what has already been stated in the opening brief. It is respectfully submitted that judgment should be reversed and the appellant recover the stipulated damages, or in the alternative that a new trial should be granted to permit further evidence along the lines of Beguelin's affidavit. This evidence would conclusively establish that the Brownell overspeed stop could not have been operated by the Handpull Safety chain and must have been operated by the "trigger," because it is undisputed that it did not operate normally by centrifugal force at the speed for which it was set. This was perhaps not emphasized sufficiently to the Trial Court, who was confused as to the Pickering governor stop and the Brownell stop as shown by the following:

"The Court: Pardon the interruption. There's a point that is a little confusing to the Court, the apparently conflicting theories with respect to these two stops. As I understand it, your theory is, or at least you subscribe to the contention that the Pickering stop worked?

"Mr. Paine: That's right.

"The Court: When the belt broke; all right,

if the Pickering stop functioned when the belt broke, then the engine, according to your theory, would have been immediately reduced to idling speed?

“Mr. Paine: That’s right.

“The Court: All right; what then could have thrown the Brownell stop, which has to attain an overspeed in order to trip automatically by centrifugal force?” (Tr. 395).

We appreciate that the Trial Judge was a very fair and able judge, but as this Court will find from an analysis of the record, this was a difficult and perplexing subject. The accident could only have happened as the appellant has outlined because the speed of the engine could not have increased if it had been “governed” at all times. The Pickering governor was supposed to do this. It didn’t because its belt broke.

*Respectfully submitted,*

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